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DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 490

Docket No. EE-RM-95-110

RIN 1904-AA64

Alternative Fuel Transportation Program

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE)

ACTION: Final Rule

**SUMMARY:** The Department of Energy is today publishing a final rule required by the Energy Policy Act of 1992 to implement statutorily-imposed alternative fueled vehicle acquisition requirements that apply to certain alternative fuel providers and some State government vehicle fleets. The rule principally covers: (1) interpretations necessary for affected entities to determine whether and to what extent the statutory requirements apply; (2) procedures for exemptions and administrative remedies; and (3) a program of marketable credits to reward those who voluntarily acquire vehicles in excess of mandated

requirements or before the requirements take effect, and to allow use of such credits in order to demonstrate compliance with those requirements.

DATES: EFFECTIVE DATE: This rule is effective **[30 days after publication]**.

FOR FURTHER INFORMATION CONTACT:

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## **SUPPLEMENTARY INFORMATION:**

### **I. Introduction**

### **II. Provision of Lead Time to States and Covered Fuel Providers**

### **III. Section-by-Section Discussion of Comments and Rule Provisions**

#### **A. Subpart A -- General Subpart**

#### **B. Subpart B -- [Reserved]**

#### **C. Subpart C -- Mandatory State Fleet Program**

## **D. Subpart D -- Alternative Fuel Provider Acquisition**

### **Mandate**

## **E. Subpart E -- [Reserved]**

## **F. Subpart F -- Alternative Fueled Vehicle Credit Program**

## **G. Subpart G -- Investigations and Enforcement**

## **IV. Review Under Executive Order 12612**

## **V. Review Under Executive Order 12778**

## **VI. Review Under Executive Order 12866**

## **VII. Review Under the Regulatory Flexibility Act**

## **VIII. Review Under the Paperwork Reduction Act**

## **IX. Review Under the National Environmental Policy Act**

## **X. Impact on State Governments**

## **I. Introduction**

This notice of final rulemaking concludes a regulatory action that is mandated under the Energy Policy Act of 1992 (the Act), Pub. L. 102-486.

That Act provides for a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on imported oil. Titles III, IV, V, and VI of the Act contain regulatory requirements and authorities, as well as various financial incentives aimed at displacing substantial quantities of oil consumed by motor vehicles. This rulemaking implements alternative fueled vehicle (AFV) acquisition requirements imposed by Congress in sections 501

and 507(o) of the Act on certain alternative fuel providers and some State government fleets. 42 U.S.C. 13251, 13257(o).

On February 28, 1995, the Department of Energy (DOE) published a notice of proposed rulemaking under sections 501 and 507(o) of the Act. 60 FR 10970. Public hearings were held in three cities with the 60-day public comment period closing on May 1, 1995. DOE received approximately 200 comments on the notice of proposed rulemaking.

DOE's notice of proposed rulemaking incorporated the statutory acquisition schedules for alternative fuel providers and State fleets. It further stated that, as provided in the Act, those schedules would take effect at the beginning of model year 1996. 60 F.R. 10971. Many commenters argued that DOE could not require compliance with the Act's acquisition schedules in model year ("MY") 1996 because it had failed to promulgate final regulations by certain deadlines set forth in the Act. They stated that imposing the requirements in MY 1996 would deprive them of lead time that Congress intended them to have to prepare to comply with the AFV acquisition requirements. After considering these comments, DOE published a notice in the Federal Register on June 12, 1995, reopening the rulemaking record for receipt of comment on various options DOE was considering to give States and covered fuel providers lead time to prepare to comply with the vehicle acquisition requirements. 60 FR 30795. DOE received approximately 80 comments on this issue.

On July 31, 1995, DOE published a second notice of limited reopening of

the comment period. The principal purpose of this notice was to invite public comment on options for defining the term "substantial portion," which is used in section 501(a) of the Act to determine coverage for certain petroleum producers and importers, and on options for modifying the proposed definition of "alternative fuel" with respect to alcohol fuels and biodiesel. Notice of limited reopening, 60 F.R. 38974, corrected 60 F.R. 40539 (August 9, 1995). In response to this reopening of the comment period, DOE received approximately 20 additional comments.

In response to comments from members of the public and State officials, and consistent with the Act, DOE has modified the proposed rule in a variety of ways. The principal modifications, which are explained in detail later in this Supplementary Information, are: (1) a one-year shift in the statutory alternative fueled vehicle acquisition schedules; (2) an automatic exemption to allow time for a State to apply for and obtain approval of an Alternative State Plan for State fleets; (3) a revised definition of the statutory term "substantial portion" that omits small refiners from acquisition requirements and includes large, integrated producers and importers; (4) the addition of neat biodiesel to the list of "alternative fuels"; and (5) a provision for the allocation of credits to State government fleets and covered fuel providers for newly acquired medium and heavy duty alternative fueled vehicles.

#### A. Background

A primary goal of the Energy Policy Act of 1992 is to enact a comprehensive national energy policy that strengthens U.S. energy security by reducing dependence on imported oil. Currently, the United States consumes seven million barrels of oil more per day than it produces. Section 502 of the Act (42 U.S.C. 13252) provides goals of a 10 percent displacement in U.S. motor fuel consumption by the year 2000 and a 30 percent displacement in U.S. motor fuel consumption by the year 2010 through the production and increased use of replacement fuels. Section 504 of the Act (42 U.S.C. 13254) allows the Secretary to revise these goals downward. According to the latest projections by the Energy Information Administration, the transportation sector will consume 13.1 million barrels per day of petroleum in 2010. Of this total, about 7.4 million barrels per day of petroleum are projected to be used by light duty vehicles. The Energy Information Administration also estimates that 65 percent of our total petroleum demand will be imported in 2010.

The greatest gains in displacing petroleum motor fuel consumption by the year 2010 are expected to occur by replacing gasoline with alternative fuels such as electricity, ethanol, hydrogen, methanol, natural gas and propane, in a portion of the U.S. car and truck population, which is projected to be in excess of 200 million vehicles in the year 2010. Currently, alternative fueled vehicles comprise a small fraction of the total U.S. vehicle stock. According to the Energy Information Administration, of the 180 million light duty vehicles registered in 1992, 250,000 were alternative fueled vehicles. Of this total,

about 221,000 were fueled by liquified petroleum gas (propane), about 24,000 were fueled by compressed natural gas, and about 3,400 were fueled by methanol or ethanol. The remaining quantity of vehicles was comprised of electric vehicles and vehicles fueled by liquified natural gas. In 1994, it was expected that 300,000 alternative fueled vehicles will be registered in the U.S. and that the proportion of vehicles operating on each fuel will be approximately the same. (Alternatives to Traditional Transportation Fuels: An Overview, DOE/EIA-0585/O, 1994)

To enable the Act's displacement goals to be met, alternative fuels must be readily accessible and motor vehicles that operate on these alternative fuels must be available for purchase. Thus, two important elements of reducing petroleum motor fuel consumption are: a nationwide alternative fuels infrastructure and the availability of alternative fueled vehicles for purchase at a reasonable cost by the general public in a wide variety of vehicle types and fueling options.

## B. Description of the Energy Policy Act Alternative Fuel Transportation Program's Basic Provisions

1. **General Structure.** Titles III, IV, V, and VI of the Act contain the basic provisions for regulatory mandates and authorities, as well as various financial incentives, all of which are aimed at displacing substantial quantities of oil consumed by motor vehicles. Title III contains general definitions which set

forth legislatively mandated policy essential to understanding: (1) what constitutes an alternative fueled vehicle; (2) who must comply with regulatory mandates to acquire such vehicles; and (3) the extent to which a regulated entity's inventory of vehicles is subject to mandates to acquire alternative fueled vehicles. Title III also sets forth mandatory requirements for Federal fleet acquisitions of alternative fueled vehicles, which began in fiscal year 1993.

Title IV includes a financial incentive program for States, a public information program, and a program for certifying alternative fuel technician training programs.

Title V provides for separate regulatory mandates for the purchase of alternative fueled vehicles which apply to: (1) alternative fuel providers; (2) State government fleets; and (3) private and municipal fleets. These mandates set forth annual percentages of new light duty motor vehicle acquisitions which must be alternative fueled vehicles. The minimum acquisition requirements are phased-in, escalating from year to year until reaching a fixed percentage. The acquisition schedules for alternative fuel providers and State governments were to take effect at the beginning of model year 1996. The acquisition schedule for private and municipal fleets in section 507(a) is a tentative schedule which may only take effect if confirmed in a DOE rulemaking. Such a rulemaking could conclude that imposition of a vehicle acquisition mandate on private and municipal fleets is not appropriate. Title V also allows for credits for alternative fueled motor vehicles acquired beyond what is legally required. These credits



may be sold and used by other persons or fleets subject to a vehicle acquisition mandate. Finally, title V contains investigative and enforcement authorities including provisions for civil penalties and, in certain circumstances, criminal fines for noncompliance with the statutory mandates and implementing regulations.

Title VI of the Act contains a variety of authorities to promote development and utilization of electric motor vehicles. More specifically, subtitle A provides for a commercial demonstration program, and subtitle B provides for an infrastructure and support systems development program.

This notice of final rulemaking principally implements the title V vehicle acquisition mandates applicable to alternative fuel providers and to State governments.

## **2. Comparison to Environmental Protection Agency (EPA)**

**Fleet Requirement Program.** The Clean Air Act, 42 U.S.C. 7401 et.seq., established a fleet vehicle acquisition program that is somewhat similar to those in the Energy Policy Act of 1992. Section 246 of the Clean Air Act requires each State in which there is located all or part of an ozone non-attainment area classified as extreme, severe, or serious under the Clean Air Act, or a carbon monoxide non-attainment area with a design value at or above 16.0 parts per million, to submit a State implementation plan revision establishing a clean fuel vehicle program providing that, beginning in model year 1998, certain percentages of covered fleet vehicles must be clean fuel vehicles operating on

clean alternative fuels. 42 U.S.C. § 7586. Section 241 of the Clean Air Act contains definitions for the terms "clean alternative fuel," "covered fleet," and "covered fleet vehicle" that contain some phrases later used in the definitions in section 301 of the Energy Policy Act of 1992.

While there are these similarities in statutory text that should not be ignored by DOE in formulating its regulations, there are critical differences between the two pieces of legislation: (1) the primary goal of the EPA program is to significantly improve air quality through reduced emissions of pollutants, and the primary goal of the DOE program is to strengthen national energy security by reducing dependence on imported oil; (2) the lists of fuels enumerated in the definitions of "clean alternative fuel" under section 241 of the Clean Air Act and of "alternative fuel" under section 301 of the Energy Policy Act of 1992 are not identical, and the Department's rulemaking discretion to add to the section 301 list is limited by stringent statutory standards; (3) the EPA program applies to fleets as small as 10 vehicles while 20 is the minimum number of vehicles for a fleet as defined by section 301; (4) the EPA program applies to light duty motor vehicles (up to 8,500 gross vehicle weight rating) and heavy duty motor vehicles (up to 26,000 gross vehicle weight rating) while the DOE program applies only to light duty motor vehicles; (5) the States will administer the EPA program while DOE will directly administer the Energy Policy Act program; and (6) the EPA program applies only to fleets in certain ozone or carbon monoxide non-attainment areas while the DOE program applies nationwide.

DOE has attempted in this rule to minimize the compliance burden on fleet owners and operators who are subject to both the EPA and the DOE fleet acquisition requirements. In particular, DOE has adopted many of the definitions and interpretations of similar terms that EPA published on December 9, 1993 (58 FR 64679). However, the different statutory provisions and goals of the Energy Policy Act have prevented DOE from adopting EPA's provisions in every instance. The most notable instance of divergence from EPA's regulations is the definition of the terms "centrally fueled" and "capable of being centrally fueled" in Subpart A. Those definitions are explained in the section-by-section discussion in this Supplementary Information.

With regard to burden of compliance, it is important to note that the overlap between this final rule and EPA regulations is limited. The EPA program applies only in certain nonattainment areas. In a final program rule published on September 30, 1994, EPA identified 22 nonattainment areas covered by the Clean Fuel Fleet Program. 59 FR 50043. EPA officials have reported to DOE that California and Texas, which contain 9 of the 22 areas, have submitted applications to "opt out" of the Clean Fuel Fleet Program. In addition, EPA expects the eastern States that are members of the Ozone Transport Commission to opt out of the program in order to participate in a 49-State Low Emission Vehicle Program that is being developed.

Thus, while irreconcilable differences in the Clean Air Act and the Energy Policy Act prevent total congruence in implementing regulations, the few

different provisions in this final rule are not expected to significantly impact many affected fleets.

## **II. Provision of Lead Time to States and Covered Fuel Providers**

The Act required DOE to issue regulations implementing the alternative fuel provider acquisition requirements in section 501(a) by January 1, 1994, 20 months before the start of MY 1996 (beginning on September 1, 1995). In addition, the Act required DOE to promulgate a rule to implement the requirements for State government fleets in section 507(o) by April 24, 1994, 16 months before the acquisition requirements became effective in MY 1996. DOE was unable to meet the statutory deadlines for promulgation of rules to implement sections 501 and 507(o) of the Act. The Act, which was enacted on October 24, 1992, contained a multitude of new responsibilities, including the alternative fueled vehicle acquisition mandates in title V. DOE was forced to prioritize its implementation of these responsibilities, and it periodically reported to Congress on the status of its implementation progress. See, for example, U.S. Department of Energy, Energy Policy Act of 1992: Implementation Status Report (Oct. 24, 1994). Although implementation of the alternative fueled vehicle acquisition requirements was given a high priority for action, the Administration's request for additional funds in fiscal year 1993 for this purpose was not approved.

Many public comments on the notice of proposed rulemaking stated that lead time was needed between promulgation of final rules by DOE and compliance with the vehicle acquisition requirements. On June 12, 1995, DOE reopened the rulemaking record for receipt of comment on various options it was considering for providing lead time to covered fuel providers and States, which would allow sufficient time for them to prepare to comply with the vehicle acquisition requirements. These options included amending the statutory vehicle acquisition schedule, staying enforcement, or some combination of amending the schedule and staying enforcement. The notice specifically requested comment on the statutory authority of DOE to amend or stay enforcement of the acquisition schedules. *See* 60 F.R. 30796.

**A. Summary of the lead time provisions in the final rule.**

The final rule provisions related to providing lead time to States and covered persons are summarized as follows:

Model Year 1996. To provide lead time for States and covered fuel providers to prepare to comply with the vehicle acquisition requirements, the acquisition schedules in § 409.201 (for State government fleets) and § 490.302 (for alternative fuel providers) have been revised to begin in MY 1997. The AFV acquisition requirements for MY 1997, which starts on September 1, 1996, must be met by August 31, 1997 (the end of the model year).

Model Year 1997. Except for States that choose to comply with an alternative plan under § 490.203, DOE may provide lead time to States and covered fuel providers in MY 1997, on a case-by-case basis, using the exemption procedures set forth in § 490.204 (for States) and § 490.308 (for fuel providers). Exemptions will be granted to any State or covered person able to demonstrate that it cannot comply with the MY 1997 vehicle acquisition requirements because of DOE's failure to promulgate regulations by the statutory deadlines. An automatic exemption is provided in § 490.203(h) to allow time for a State government fleet to apply for and obtain approval of a Light Duty Alternative Fueled Vehicle Plan.

Acquisition Level in MY 1997. DOE has reduced the required acquisition percentages in the alternative fueled vehicle acquisition schedules in § 490.201 and § 490.302 by one model year. Thus, States and covered persons are required to acquire vehicles in MY 1997 at the statutory percentage for MY 1996; in MY 1998 at the MY 1997 statutory percentage; and so on .

Credits for MY 1996 Acquisitions. DOE has revised § 490.503(b) and (c) to provide that credits will be allocated for alternative fueled vehicles acquired on or after October 24, 1992, and before September 1, 1996, the beginning of MY 1997. Those purchases are early-acquired vehicles.

## **B. Discussion of lead time.**

## **1. Comments against providing lead time.**

Many commenters, principally producers and suppliers of alternative fuel and alternative fueled vehicles and related equipment, argued that because the Act's requirements are relatively straightforward and have been known since October 24, 1992, DOE need not provide lead time to entities subject to the vehicle acquisition requirements, except as a matter of equity in particular instances. Other commenters stated that Congress expressly contemplated the need for delaying or reducing the acquisition requirements when it enacted section 501(b). They argued that because section 501(b) authorizes DOE to delay or modify the requirements only for MY 1997 and later, DOE may not delay or reduce the acquisition requirements for MY 1996. In addition, they stated that because section 507(o) does not contain any provision allowing DOE to delay or modify State purchase obligations, DOE may not delay or reduce the State fleet acquisition requirements.

Some commenters stated that a delay of the vehicle acquisition mandates would jeopardize investments they have made in the production of alternative fueled vehicles or elements of alternative fuels infrastructure.

## **2. Comments for providing lead time.**

Many commenters, principally covered fuel providers and fleet operators,

argued that they are entitled to at least the amount of lead time provided in sections 501(a) and 507(o) for fuel providers and States, respectively. Some commenters made the additional argument that Congress intended the acquisition requirements to take effect at the beginning of a model year. In their view, DOE is required to delay the statutory vehicle acquisition requirements until MY 1998 to provide regulated entities the amount of time the Act provides between promulgation of rules and compliance. Some commenters stated that section 507(l) of the Act (42 U.S.C. 13257(l)), which includes lead time requirements among various factors DOE shall take into consideration in carrying out section 507, constitutes express authority for DOE to delay the vehicle acquisition requirements for State fleets and covered fuel providers.

One commenter also argued that DOE can and should grant fuel providers a general exemption from the MY 1996 requirements, under section 501(a)(5) of the Act, because alternative fueled vehicles meeting the normal requirements and practices of covered entities will not be reasonably available by MY 1996. In essence, this commenter argued that because limited types or models of alternative fueled vehicles will be available to satisfy fleet needs, all covered persons should be relieved of the MY 1996 acquisition requirements.

Most of the comments favoring delay of the acquisition mandates contained only general statements about the need for lead time. However, commenters stated that many State government fleets and covered persons



cannot acquire alternative fueled vehicles in MY 1996 because their vehicle acquisition processes are too far advanced. Commenters also stated that lead time was needed to discuss costs and options with affected fleet managers, obtain vehicle and fueling facility cost estimates, prepare budgets, identify funding mechanisms, obtain approval of budgets, prepare specifications for vehicles and fueling facilities, issue solicitations for bids, and provide training for persons engaged in the fueling, operation, and repair of the alternative fueled vehicles.

### **3. DOE response to public comments on lead time.**

DOE does not agree with comments stating that DOE is not required to, and should not, provide any lead time to allow States and covered fuel providers to prepare to comply with the vehicle acquisition mandates. Although regulated entities have had notice of the Act's basic requirements since enactment in 1992, the Act provides for DOE to promulgate rules filling in essential substantive, procedural, and interpretive details before the statutory vehicle acquisition requirements take effect. It is true that there is no express link in the Act between the deadline dates for promulgation of rules and the dates that the vehicle acquisition schedules take effect. Nevertheless, the structure of the Act, including a hiatus between these dates, indicates Congress's intent that regulated entities would have some lead time between

promulgation of final regulations and the effective date of the vehicle acquisition requirements to comprehend the programmatic requirements as fully defined by DOE, to apply for applicable exemptions if appropriate, and otherwise plan an execute pre-compliance activities. DOE recognizes that section 501(b), which allows DOE to reduce or delay the acquisition requirements for fuel providers (but not States) in MY 1997 and thereafter, can be read as an implicit limitation on DOE discretion to modify the statutory acquisition schedule for alternative fuel providers because it is silent with respect to MY 1996. Similarly, DOE recognizes that the silence in section 507(o) with regard to modifying the schedule for State fleets can be interpreted as a lack of authority to provide relief for MY 1996 or to provide limited exemption to accommodate the right of a State to apply for approval of an alternative compliance plan. However, both section 501 and 507(o) are premised upon timely promulgation of regulations, and neither of these provisions address what DOE should do in the event that it proved impossible to promulgate on time. In order to make the necessary adjustments, DOE is choosing to read section 501 and 507(o) without drawing negative implications of lack of authority to deal with problems caused by late promulgation that Congress could have anticipated but omitted to address.<sup>1</sup>

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<sup>1</sup>At the same time, it is noted that DOE does not interpret section 507(1), 42 U.S.C. 13257(1), as express authority to delay the acquisition requirements for States and covered fuel providers. Section 507(1), which applies only to decisions under that section, has no applicability to the fuel provider mandate in section 501 of the Act. As applied to the State program, section 507(1) directs DOE to consider a variety of factors when it has discretion to consider them. DOE has heeded this provision in preparing this final rule.

DOE is not persuaded by the comments that it is required by the Act to provide lead time to States and covered fuel providers in the amount of the exact number of months in the Act between the deadline for promulgation of final regulations and the date the statutory acquisition schedules take effect. As pointed out above, the text of the Act does not expressly link these dates. Moreover, the statutory provisions making up the structure of the Act indicate that Congress was not wedded to any fixed period of lead time. For example, the Act provides different amounts of lead time for States (16 months) and covered fuel providers (20 months). It also allows States to submit alternative compliance plans at the end of the 12 month period provided for submitting such a plan. In such a case, a State would only have a few months lead time at most between DOE approval of plans and compliance with the MY 1996 acquisition requirements (beginning September 1, 1995). It is unlikely that the drafters of the Act thought that States, some of which have biennial budgets, would need significantly less time than fuel providers to prepare to comply with the MY 1996 vehicle acquisition requirements. Moreover, the small amount of lead time that a State with an alternative compliance plan might have suggests that Congress did not think that 16 months, let alone 20 months, of lead time is a necessity. It also is significant that the statutory provision on alternative compliance plans for States, section 507(o)(2), expressly provides for a 12 month period beginning on the date of the promulgation of final regulations under section 507(o). That language shows that Congress used very precise

words when it wanted to create a fixed lead time period. The omission of similar express language in section 501 and 507(o)(2) implies that Congress did not intend to establish an absolute amount of lead time prior to State and fuel provider compliance with the vehicle acquisition requirements.

Because MY 1996 has already begun, it is not possible for DOE to both provide adequate lead time and require compliance with the statutory MY 1996 acquisition requirements. DOE must, as a matter of administrative necessity, relieve regulated entities from the MY 1996 requirements and determine a lead time period that is appropriate in this situation. For the reasons stated hereafter, DOE has concluded that it will best effectuate the Act's vehicle acquisition mandates with an unconditional one-model year delay, combined with an automatic exemption to allow a State to apply for and obtain approval of an alternative compliance plan, and the case-by-case provision of lead time through the exemption processes in the rule.

With some exemptions, such as States opting to develop alternative compliance plans, States and fuel providers should be able to acquire alternative fueled vehicles through their normal procurement processes. States with annual budgets commonly will approve their fiscal year 1997 budgets in the summer of 1996. Model year 1997 begins on September 1, 1996, and States have until August 31, 1997 to meet their MY 1997 vehicle acquisition requirements. Assuming that State contracts for new vehicles are awarded by the end of 1996, State agencies will have several months to select and place

orders for new vehicles in MY 1997. As explained in the discussion of §490.204, States that have biennial budget cycles and cannot comply using their normal procurement procedures will be granted exemptions from the requirements.

The record shows that covered fuel providers have a shorter and more flexible procurement process than States.<sup>2</sup> The record is devoid of specific information showing that fuel providers generally cannot comply by the end of MY 1997 through their normal procurement processes. The commenters' desire for more time than most fuel providers are likely to need is more than outweighed by the potential damage to the interests of automakers and others who in reliance on the Act have invested in alternative fueled vehicle production capacity or other aspects of alternative fuel infrastructure, and who commented critically on the policy options for providing lead time.

The rulemaking record also shows that alternative fueled vehicles and alternative fuels will be widely available in MY 1997. Manufacturers of alternative fueled vehicles and conversion kits and alternative fuel equipment manufacturers and suppliers stated in their comments that they have been preparing to meet the increased demand for their products and services flowing from the vehicle acquisition mandates. Although limited types of OEM vehicles

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<sup>2</sup>The Western States Petroleum Association, referring to a National Association of Fleet Administrators study, stated that most fleets make acquisition plans in July and August for October delivery. (Comment No. 35, p. 9). The American Petroleum Institute indicated that typically orders must be placed in August or early September to obtain delivery in October. (Comment No. 147, p. 26).

will be available in MY 1996, information supplied by automobile manufacturers shows a growing capacity and a desire to meet demand for alternative fueled vehicles in MY 1997. *See, e.g.*, production plans described in the second notice of limited reopening, 60 FR 38974, at 38977. DOE also received comments from companies in the after-market conversion business which stated that they are anticipating demand for their products and services.

Although alternative fuels and alternative fueled vehicles will be widely available in MY 1997, comprehensive information does not exist on the precise quantities that will be available and whether they will match fleets' needs. Undoubtedly, some fleets will not be able to acquire alternative fueled vehicles in MY 1997 that meet their normal requirements and practices. For example, the record shows that currently few Original Equipment Manufacturer (OEM) alternative fueled vehicles are offered in the compact size range. In addition, most OEM alternative fueled vehicles are only available in one alternative fuel configuration. Similarly, although alternative fueling sites exist and are growing in number in many urban markets, alternative fueling infrastructure is lacking in other areas.

However, the fact that some covered persons and fleets will not be able to acquire alternative fueled vehicles or alternative fuels that meet their needs in MY 1997 does not justify a longer unconditional delay of the vehicle acquisition requirements. Congress was aware that, initially, alternative fueled vehicles and alternative fuels would not be available in sufficient amounts and

types to satisfy the needs of every covered person and fleet. Anticipating the possibility of uneven availability of vehicles and fuel, Congress provided that exemptions must be granted to both covered fuel providers (section 501(a)(5)) and State fleets (section 507(i)) if alternative fuels or alternative fueled vehicles that meet their normal requirements and practices are not available. States also are eligible for an exemption if compliance would produce an unreasonable financial hardship. DOE will use these exemption processes, included as § 490.204 and § 490.308, to provide additional lead time to covered fuel providers and States that are unable to comply with the acquisition requirements in MY 1997 because of DOE's delay in promulgating a final rule.

DOE expects the criteria for granting exemptions will be flexible enough to respond to exemption requests received in MY 1997 based on inadequate lead time. For example, DOE would likely find unreasonable financial hardship justifying an exemption for any State that cannot meet the MY 1997 requirements by following its regular budget and procurement processes (e.g., a State with a biennial budget). A whole or partial exemption also would likely be granted under § 490.204 if, despite a good faith effort, a State was unable to complete an alternative compliance plan in time to comply in MY 1997. DOE also will apply the criteria and documentation requirements in § 490.308 flexibly in reviewing requests by covered fuel providers who show they need additional lead time to comply.

### **C. Discussion of adjustments to vehicle acquisition levels.**

DOE invited public comment on the question of whether, at the end of the lead time period, States and covered persons should be required to acquire vehicles at the percentage levels set forth in the statutory schedules for MY 1997 and after, or whether DOE should defer each step of the statutory schedules by the lead time period.

#### **I. Comments.**

Most commenters favoring a delay of the acquisition requirements also favored lowering the acquisition percentages at the end of the lead time period, with the effect of deferring each step of the acquisition schedule by the period of the postponement of the initial requirement. These commenters argued that if DOE required compliance with the applicable statutory model year percentage at the end of the lead time period, it would upset the Act's scheme for the gradual "ramping up" of alternative fueled vehicle purchases and the orderly development of the alternative fuel infrastructure.

Many of the commenters opposing delay urged DOE to require compliance with the MY 1997 statutory percentage in MY 1997. These commenters also argued that if DOE delayed compliance for one year, it should require States and covered fuel providers to make up the MY 1996



requirements in subsequent years. In this way, they argued, DOE could satisfy the congressional intent that there be some lead time for covered persons, while at the same time keeping the programs on track with respect to overall vehicle acquisitions.

## **2. Response to comments.**

DOE agrees with the commenters who argued that the Act's gradual "ramping up" scheme would be upset if DOE enforced the statutory MY 1997 vehicle acquisition percentages in MY 1997, after having delayed the start of compliance by one year in order to provide lead time to covered fuel providers and States. The statutory percentages for the first year of compliance, MY 1996, are 10 percent for States and 30 percent for covered fuel providers. The MY 1997 alternative fueled vehicle acquisition percentages are 15 percent for States and 50 percent for covered fuel providers.

DOE believes that the difference between the first and second year requirements under the statutory schedules is significant and that it would be inconsistent with the statutory framework to require covered fuel providers and States to comply with the MY 1997 acquisition levels, which Congress established for the second year of the acquisition mandates, in what has become the first year of the program. Further, having decided to require compliance in MY 1997 at the MY 1996 statutory percentages, DOE concludes

that it is necessary to reduce future year percentages by one model year in order to preserve the statutory scheme of gradually increasing the acquisition requirements over a period of years.

Some comments pointed out that although section 501(b) permits DOE to reduce the acquisition percentage requirements for covered fuel providers for MY 1997 and thereafter, there is no comparable provision in section 507(o) that permits DOE to lower the percentages for State government fleets. There is no legislative history that explains the different treatment of fuel providers and States, but some commenters speculated that Congress did not include a provision permitting DOE to lower the percentages for State fleets because the percentages in section 507(o) are much lower than for fuel providers in the early years of the program. In any event, DOE does not interpret the Act's provisions to prevent it from making adjustments that are consistent with Congress' evident intent to provide lead time to covered fuel providers and States before requiring compliance with the mandates.

#### **D. Discussion of giving credits for alternative fueled vehicle acquisitions in MY 1996.**

Several commenters stated that covered persons and fleets that have made plans to comply with the acquisition requirements in MY 1996 would be penalized if DOE delayed the compliance schedule and did not award them

credits for alternative fueled vehicle acquisitions in MY 1996. DOE agrees. The final rule provides that the acquisition of alternative fueled vehicles by covered persons and State fleets will be treated as early-acquired vehicles, which are eligible for one credit for each year they are acquired before they are required to be acquired. Awarding credits for MY 1996 vehicle acquisitions will avoid any disadvantage that otherwise would be experienced by State government fleets and covered persons. It also creates an incentive for covered persons and fleets to acquire alternative fueled vehicles in MY 1996, which will further the petroleum displacement and air quality goals of the Act.

### **III. Section-By-Section Discussion of Comments and Rule Provisions**

This section of the Supplementary Information responds to significant comments on specific rule provisions. It also contains explanatory material for some rule provisions that were not the subject of public comment in order to provide interpretive guidance (mostly drawn from the preamble to the notice of proposed rulemaking) to States and persons that must comply with this part. Most changes from the notice of proposed rulemaking are explained in this section. However, some nonsubstantive changes, such as the renumbering of paragraphs and changes to clarify the meaning of rule provisions, are not discussed.

## **A. Subpart A -- General Subpart**

### **Definition of "Fleet," "Centrally Fueled," and "Capable of Being**

**Centrally Fueled"** To promote easier understanding, DOE has divided the statutory definition of "fleet" into two parts. The main paragraph in the statutory definition appears in § 490.2 under the word "fleet." This regulatory definition of "fleet" cross references § 490.3, which describes the categories of vehicles excluded by statute from the definition.

Section 301(9) of the Act limits the term "fleet" to vehicles used primarily in a metropolitan statistical area (MSA) or consolidated metropolitan statistical area (CMSA) with a 1980 population of more than 250,000. Consistent with the Act, the definition of "fleet" in § 490.2 cross references Appendix A to subpart A, which sets forth a list of MSAs and CMSAs with 1980 Bureau of the Census population of 250,000 or more. Appendix A was generated from information in "The Statistical Abstract of the United States, 1993," which lists all of the MSAs and CMSAs, as defined by the Office of Management and Budget (OMB) as of December 31, 1992, with a Bureau of Census population of 250,000 or more as of 1991. This document also gives the 1980 Census populations for these areas. The MSAs and CMSAs included in Appendix A are those statistical areas, as defined by OMB at the end of 1992, that have 1980 Census populations of 250,000 or more.

One commenter objected to the inclusion of a city in Appendix A because its 1980 population was less than 250,000. The city and surrounding

area were subsequently classified as an MSA, prior to October 24, 1992, based on census data. DOE has not removed the MSA from the list because, as shown in the Bureau of the Census' 1993 statistical abstract, the area now classified as an MSA had a 1980 population greater than 250,000.

The statutory definition of "fleet" does not specify whether the list must be updated in light of changes in the geographic areas designated by the Bureau of the Census as MSAs and CMSAs which meet the 1980 population requirement of the Act. Comments were received as to whether DOE should update the Appendix A list to add new MSAs/CMSAs that had a 1980 population of 250,000. The majority of these comments were against adding areas to the list because of the uncertainty that updating might cause. DOE does not interpret section 301(9) of the Act to require it to update the list of MSA/CMSAs, and in light of these comments, has decided not to update the Appendix A list in the future.

A few comments urged DOE to remove areas from the list in Appendix A if their populations have fallen below 250,000 since 1980. DOE has not adopted this recommendation because the language of section 301(9) of the Act, 42 U.S.C. 13211(9), is unambiguous in including all areas having a 1980 population of 250,000, as determined by the Bureau of the Census, in the definition of "fleet."

Consistent with the statutory language, the definition of "fleet" requires that there be a minimum of 20 light duty motor vehicles "used primarily" in a

relevant statistical area. As discussed below under "Other Definitions," DOE interprets "used primarily" to mean that the majority (i.e., over 50 percent) of each vehicle's total annual miles are accumulated within a covered statistical area.

The statutory and regulatory definitions of "fleet" also provide that the vehicles be "centrally fueled or capable of being centrally fueled." As discussed more fully below, § 490.2 defines the term "centrally fueled" to mean that a vehicle is fueled at least 75 percent of the time at a location that is owned, operated, or controlled by a fleet or covered person, or is under contract with the fleet or covered person for refueling purposes. Vehicles that do not meet the 75% centrally fueled criterion are excluded from the vehicles counted to determine whether a "fleet" exists, and they are excluded from the base used to calculate a covered fuel provider's or State fleet's alternative fueled vehicle acquisition requirements. The Act does not make the centrally fueled criterion applicable to the actual operation of fleet vehicles. As explained elsewhere in this Supplementary Information, section 501(a)(4) of the Act requires alternative fueled vehicles acquired by covered fuel providers to be operated solely on alternative fuels, except when operating in areas where alternative fuel is not available. The Act does not establish operational requirements for State government fleets subject to the acquisition requirements.

It should be noted that the statutory requirement covers those vehicles that are centrally fueled or are capable of being centrally fueled. It is possible

that a vehicle that is not currently centrally fueled could be centrally fueled. Therefore, an organization which has determined that its vehicles are not centrally fueled must still determine if the vehicles are capable of being centrally fueled. If the vehicles are so capable, then the total vehicles either centrally fueled or capable of being centrally fueled may result in a "fleet" or "covered person" that is subject to the acquisition requirements of the Act.

In determining whether 20 or more light duty motor vehicles within a MSA or CMSA are centrally fueled or capable of being centrally fueled, the organization must also consider situations where vehicles that are centrally fueled or capable of being centrally fueled are present in more than one location within the MSA or CMSA. The number of vehicles at all locations that are centrally fueled or capable of being centrally fueled must be totaled. For example, if a fleet or covered person has 12 vehicles at location A that are centrally fueled or capable of being centrally fueled and 10 vehicles at location B that are also centrally fueled or capable of being centrally fueled, the organization has 22 vehicles in a MSA or CMSA that are centrally fueled or capable of being centrally fueled.

Relying upon EPA's determination that "contract fueling" is one method of establishing whether fleet vehicles are centrally fueled, DOE noted in the notice of proposed rulemaking that retail credit card purchases by themselves are not considered to be a contractual refueling agreement. However, the notice concluded, as did EPA, that commercial fleet credit cards are considered

to be a contractual refueling agreement, since they are intended as a special fuel arrangement for fleet purchases alone. The intent of DOE's proposed definition was to ensure that only those fleet-based agreements which provide special fleet refueling benefits at a particular facility or group of facilities would qualify as central fueling.

Several commenters brought to DOE's attention that EPA had modified its determination regarding the role that fleet payment methods play in establishing whether fleet vehicles are centrally fueled or capable of being centrally fueled. In a September 30, 1994, Federal Register notice (59 FR 50068), EPA states that it "will no longer recommend that States look to the payment method as a key indicator of the presence or absence of central fueling." In its place EPA recommends that "States look at the actual refueling patterns used by fleet operators." DOE has deleted the reference to credit card agreements from its definitions of "centrally fueled" and "capable of being centrally fueled" to be consistent with EPA.

Section 490.2 defines the terms "centrally fueled" and "capable of being centrally fueled" to mean a vehicle is or can be refueled at least 75 percent of its time at a location, that is owned, operated, or controlled by the fleet or covered person, or is under contract with the fleet or covered person for refueling purposes. The method that DOE is requiring for determining central fueling capability is whether 75 percent of a vehicle's total annual miles traveled are derived from trips that are less than the operational range of the vehicle.



As defined by EPA, in its December 9, 1993, Federal Register notice (58 FR 64684) on the final rule for the definitions and general provisions for the Clean Fuel Fleet Program, the operational range is the distance a vehicle is able to travel on a round trip with a single refueling.

The DOE definitions differ from the EPA definitions of "centrally fueled" and "capable of being centrally fueled," at 40 CFR 88.302-94, because the DOE definitions do not require that vehicles covered must be capable of being centrally fueled 100 percent of the time. DOE received comments, principally from representatives of natural gas and propane producers and marketers that supported the 75 percent central fueling standard in DOE's proposed definitions of "centrally fueled" and "capable of being centrally fueled." Some of these commenters stated that a 100 percent standard would allow fleets to easily avoid the requirements by redefining vehicle missions and operating zones. Other commenters, principally representatives of covered fuel providers and fleet administrators, recommended that DOE adopt a 100 percent central fueling definition. Most of these commenters argued that DOE should adopt the EPA definition to minimize confusion and regulatory burdens on fleets required to comply with both programs.

After considering the comments, DOE decided to retain the 75 percent central fueling standard in the final rule. DOE's decision to not adopt EPA's definition of "centrally fueled" is rooted in statutory differences between the Clean Fuel Fleet Program, administered by EPA, and the Department's

## Alternative Fuel Transportation Program.

EPA's program applies in certain non-attainment areas with the goal of improving the air quality in those areas. EPA's explanation of its final rule shows that EPA did not look favorably on the inclusion of dual-fueled vehicles in the Clean Fuel Fleet Program. EPA concluded that the purchase of flexible-fuel or dual-fueled vehicles would achieve significantly less emissions reduction than dedicated alternative fueled vehicles, which operate on a single type of fuel. 60 F.R. 64681. EPA expressly acknowledged that, by adopting a 100 percent refueling standard, fewer vehicles would be covered by its program.

By contrast, DOE's Alternative Fuel Transportation Program applies throughout the Nation, and its primary goal is to reduce the nation's dependence on petroleum as a transportation fuel. DOE's program, as it applies to covered fuel providers, is not limited to fleets operating in large metropolitan statistical areas. "Alternative fueled vehicle" is defined in section 301(2) of the Act to include a dual fueled vehicle. This shows that Congress anticipated that alternative fuels would not be available to all covered vehicles all of the time. This is also reflected in section 501(a)(4), which requires alternative fueled vehicles acquired by covered fuel providers to operate solely on alternative fuels *except when operating in an area where the appropriate alternative fuel is unavailable*. 42 U.S.C. § 13251(a)(4).

DOE believes that allowing the use of all types of alternative fueled vehicles, not just dedicated vehicles, provides flexibility to fleet operators in

acquiring vehicles that meet their normal requirements and practices. This is especially important during the initial years of the program, when the fueling infrastructure for alternative fueled vehicles will not be fully developed.

In addition, vehicles acquired under DOE's program are required to operate on fuels that are "substantially not petroleum." *See* section 301(2) of the Act (definition of "alternative fuel"). By contrast, EPA's Clean Fuel Fleet Program may include vehicles that use reformulated gasoline and clean diesel fuel. The greater availability of reformulated gasoline and clean diesel makes the 100 percent refueling standard more reasonable in the EPA program.

In summary, DOE believes a 100 percent standard for the definition of "centrally fueled" and "capable of being centrally fueled" would unduly compromise the Energy Policy Act's goals of displacing petroleum and fostering development of an alternative fuels infrastructure.

The statutory definition of "fleet" requires that a minimum of 20 vehicles be "owned, operated, leased, or otherwise controlled by a governmental entity or other person." 42 U.S.C. 13211(9). Section 490.2 contains a definition of "lease" that excludes vehicles under rental agreements of less than 120 days. This provision is consistent with the EPA regulations. As EPA explained, a person does not have the same level of control over a vehicle lease for a short period of time, and the 120-day period takes into account short term variations in fleet operations and the number of fleet vehicles that ought not to trigger the vehicle acquisition mandates. 58 FR at 64687.

The statutory definition of "fleet" uses the concept of "control" to establish the guidelines for attributing vehicles to a fleet for the purposes of determining whether the 50-vehicle minimum is satisfied. There is similar language in the definition of "covered fleet" which applies to the EPA fleet program requirement. EPA has promulgated a definition of "control" (40 CFR §88.302-94), which DOE has adopted with slight modifications to omit language not relevant to DOE's program.

#### Other Definitions

Acquire. The Department was asked to define the term "acquire" by a few commenters. They were uncertain as to whether the term referred to ordering a vehicle, paying for a vehicle, or taking possession of a vehicle. In § 490.2, the Department defines "acquire" to mean taking into possession or control, which is a dictionary definition. Thus, a vehicle is acquired when it is taken into possession or control.

After-Market Converted Vehicle. Section 490.2 defines the term "after-market converted vehicle" as a new or used conventional fuel Original Equipment Manufacturer vehicle that has been converted to operate on alternative fuel by an after-market converter. This converter must be in compliance with all Federal, State, and local laws at the time of conversion. After-market converted vehicles differ from Original Equipment Manufacturer converted vehicles with respect to which company warrants the conversion and

its components. In the case of an Original Equipment Manufacturer converted vehicle, the vehicle is converted prior to first sale by a manufacturer or conversion company under contract to the manufacturer to convert Original Equipment Manufacturer vehicles, and is then offered by the Original Equipment Manufacturer, with warranty coverage through the Original Equipment Manufacturer, for sale to the general public. In the case of an after-market converted vehicle, the conversion is performed by an after-market converter, who provides the warranty for the vehicle conversion and the conversion kit.

Alternative Fuel. Section 490.2 defines the term "alternative fuel" consistent with the definition of that term in section 301 of the Act.

Several commenters requested that propane (liquified petroleum gas) be removed from the list of fuels in the definition of "alternative fuel" in § 490.2. The definition of this term tracks section 301(2) of the Act, which lists fuels that are alternative fuels and grants the Secretary the authority to add fuels to the definition of "alternative fuel", by rule, if they meet certain conditions. However, section 301(2) does not authorize the Secretary to delete any fuel listed in the statutory definition. Thus, the Department has not removed liquefied petroleum gas (or propane) from the definition of "alternative fuel."

Many commenters requested that biodiesel, and biodiesel blends, be included in the Department's regulatory definition of "alternative fuel" because biodiesel is a fuel "(other than alcohol) derived from biological materials." As

described in the comments, biodiesel is produced from vegetable oils, such as soybean oil, which are biological materials. The commenters also stated that biodiesel offers significant reduction in harmful tailpipe emissions of hydrocarbons, carbon monoxide and particulate matter; is essentially free of sulfur and harmful aromatics; and is non-toxic and biodegradable. These commenters also submitted information to show that biodiesel can be made wholly from domestic products, and that it has a positive energy balance in its production process.

After carefully reviewing all of the comments on this issue, the Department included in its July 31, 1995 Federal Register notice its tentative conclusion that neat (or 100 percent) biodiesel meets the criteria in section 301(2) for an alternative fuel; namely, that it is a fuel, other than alcohol, that is derived from biological materials. Several comments were received in support of this designation. No comments were received in opposition to this position. For the reasons set forth in the July 31 notice, the Department has revised the definition of "alternative fuel" in section 490.2 to include neat biodiesel. It is noted, however, that a DOE interpretation of "alternative fuel" to include neat biodiesel does not relieve biodiesel manufacturers from any Federal, State, local government, or automobile manufacturer requirements that may apply to the production and use of biodiesel for motor fuel.

In its July 31, 1995 notice, DOE stated that it did not intend to include mixtures or blends of biodiesel in the definition of "alternative fuel" in this

rulemaking. DOE stated that more study is required before a determination on biodiesel blends can be made. After reviewing all of the comments on this issue, DOE has concluded that an additional rulemaking proceeding is required to develop the information needed to reach a conclusion on which, if any, mixtures or blends of biodiesel should be included in the definition of "alternative fuel."

One commenter stated that neat biodiesel may not be the only biologically derived fuel that can be classified as an "alternative fuel," and requested clarification that the inclusion of neat biodiesel in the definition would not preclude other biologically derived fuels from receiving this designation. The Department is not currently aware of any other biologically derived fuels that are not already included in the definition of "alternative fuel." However, if DOE were asked to designate another biologically derived fuel as an alternative fuel, the fuel would be evaluated on its merits to determine if it meets the criteria for an alternative fuel.

In its July 31, 1995, Federal Register notice, the Department invited interested persons to submit data, reports and analyses in support of previous requests that DOE revise the definition of "alternative fuel" to include alcohol blends containing no less than 70 percent alcohol by volume. In response, the Department received two submissions containing information relevant to this issue. These submissions show that decreasing the level of alcohol can improve the cold start ability of alcohol fueled vehicles. The data shows that by

decreasing the level of alcohol to 70%, some vehicles are able to start in weather 11 degrees F colder than they were previously able. But the data and reports of field operation of these vehicles also show that vehicles operating on 85% blends of ethanol or methanol can start in winter conditions if certain procedures are followed and certain precautions taken. These precautions and procedures are recommended for cold-start of vehicles irrespective of what fuels they operate on. In addition, it appears that several different combinations of non-alcohol components with varying Reid Vapor Pressures are capable of providing cold start performance at the automakers' target temperature.

After carefully analyzing the information that has been submitted, the Department has concluded that it needs additional information before it can determine that 70 percent alcohol blends are required for the cold-start of alcohol fueled vehicles. Therefore, the definition of "alternative fuel" in this rule retains the statutory 85 percent standard for alcohol fuels. A separate rulemaking, initiated by DOE or following a petition filed pursuant to §490.6 of this part, will permit the issues related to lowering the alcohol percentage to be fully explored.

DOE received many comments arguing that reformulated gasoline should be added to the list of fuels included in the definition of "alternative fuel" in § 490.2. Commenters stated that use of reformulated gasoline contributes to reduction of air pollutants and, because of its increased oxygen content, displaces petroleum. Some of these commenters argued that reformulated



gasoline meets the statutory test of being "substantially not petroleum." Some commenters argued that including reformulated gasoline in the definition of "alternative fuel" would be consistent with Congress' allowance of reformulated gasoline under EPA's clean fuel fleet program. One commenter argued that use of reformulated gasoline should be permitted in air quality non-attainment areas, but not elsewhere, in order to reduce the regulatory burden on fleets in those areas. Other commenters stated that allowing reformulated gasoline in the DOE program would help industry recoup its investment in the production and marketing of reformulated gasoline to meet air quality goals. Some commenters recommended that DOE should seek amendment of the Energy Policy Act to correct the omission of reformulated gasoline from the list of fuels included in the statutory definition of "alternative fuel."

DOE also received many comments opposed to including reformulated gasoline in the definition of "alternative fuel" in § 490.2. These commenters argued that reformulated gasoline is substantially petroleum in composition, and that recognizing it as an alternative fuel would not contribute to development of non-petroleum fueling and vehicle technologies. Commenters stated that although reformulated gasoline is a low-cost way to reduce hydrocarbon emissions, its use will not significantly further the Act's petroleum displacement goals.

The Department adheres to its view that reformulated gasoline does not meet the Act's criteria for designation as an "alternative fuel." The percentage

of petroleum in reformulated gasoline is too large to warrant finding that it is "substantially not petroleum," which is required for classifying a fuel as an "alternative fuel" under section 301(2) of the Act. The notice of proposed rulemaking stated that reformulated gasoline is comprised of over 90 percent petroleum. A commenter who represents the petroleum industry disputed this figure, and stated that reformulated gasoline only contains 83 percent petroleum. Even assuming that the commenter's figure of 83 percent is correct, that percent petroleum volume is still too large to warrant a determination that reformulated gasoline is "substantially not petroleum."

Several comments were received requesting that low-sulphur diesel and clean diesel be included as alternative fuels. The Department has not adopted these recommendations because low-sulphur diesel and clean diesel are fuels comprised almost totally of petroleum, and thus, cannot be considered to be substantially not petroleum.

Covered Person. Section 490.2 defines the term "covered person" consistent with the definition of that term in section 301 of the Act.

Dealer Demonstration Vehicles. No comments were received on the definition of "dealer demonstration vehicle." Section 490.2 follows the EPA definition of the term "dealer demonstration vehicle" found at 40 CFR §88.302-94. EPA defines "dealer demonstration vehicle" as any vehicle that is operated by a motor vehicle dealer solely for the purpose of promoting motor vehicle sales, either on the sales lot or through other marketing or sales promotions, or

for permitting potential purchasers to drive the vehicle for pre-purchase or pre-lease evaluation. Vehicles held by dealers for their own business purposes, such as shuttle buses, loaner vehicles, or other repair or business-related vehicles are not exempt, unless they are also offered for retail sale as part of the dealer stock or are rotated through the fleet back to the dealer stock.

Dedicated Vehicle. The notice of proposed rulemaking included the statutory definition of "dedicated vehicle" in section 301(6) of the Act, 42 U.S.C. 13211(6). Section 301(6) provides that a dedicated vehicle is either: (i) a "dedicated automobile" as defined in section 513(h)(1)(C) of the Motor Vehicle Information and Cost Savings Act, codified at 49 U.S.C. 32901(a)(7), or (ii) a motor vehicle, other than an automobile, that operates solely on alternative fuel.

DOE received no public comments on the proposed definition of "dedicated vehicle." Nevertheless, in the final rule DOE has revised the portion of the definition relating to a "dedicated automobile" to include the language of the cross-referenced statute, as a convenience for regulated entities. As defined in the Motor Vehicle Information and Cost Savings Act, a "dedicated automobile" means "an automobile that operates only on alternative fuel." 49 U.S.C. 32901(a)(7) (emphasis added). DOE interprets the word "automobile," as used in the definition of "dedicated automobile" and incorporated by reference in section 301(6), to mean an "automobile," as that term is defined in section 501(1) of the Motor Vehicle Information and Cost Savings Act, codified at 49 U.S.C. 32901(a)(3). DOE has added a definition of "automobile" to

§490.2, which is adapted from and is intended to have the same meaning as "automobile" defined in section 501(1) of the Motor Vehicle Information and Cost Savings Act.

Dual Fueled Vehicle. Section 301(8) of the Act, 42 U.S.C. 13211(8) defines "dual fueled vehicle" as: (i) a dual fueled automobile, as such term is defined in section 513(h)(1)(D) of the Motor Vehicle Information and Cost Savings Act, or (ii) a motor vehicle, other than an automobile, that is capable of operating on alternative fuel and is capable of operating on gasoline or diesel fuel. DOE included the statutory definition in the proposed rule, with slight modifications to make clear that term includes all vehicles that are capable of operating on an alternative fuel and on gasoline or diesel fuel, including those commonly referred to as "bi-fuel," flexible fuel," and "dual fuel" vehicles.

DOE received public comment on the proposed definition of "dual fueled" vehicle. One commenter urged DOE to adopt definitions of "dual fuel vehicle" and "flexible fuel vehicle" in regulations published by EPA for its Clean Fuel Fleet Program (59 FR 50042, Sept. 30, 1994). DOE cannot adopt this recommendation in its entirety because of differences in the underlying statutes. The Clean Air Act establishes clean alternative fuel standards for flexible fuel vehicles and dual fuel vehicles, 42 U.S.C. 7581. EPA has, in implementing regulations, defined the term "dual fuel vehicle" to mean a "bi-fuel vehicle" (i.e., one that is engineered and designed to be operated on two fuels, but not a mixture of two or more different fuels) and the term "flexible fuel vehicle" to

mean a vehicle that is engineered and designed to be operated on any mixture of two or more different fuels. 59 FR 50045. By contrast, section 301(3) of the Act defines an "alternative fueled vehicle" to mean a "dedicated vehicle" or a "dual fueled vehicle." Thus, if DOE were to adopt EPA's definition of "dual fuel vehicle," flexible fuel vehicles would be excluded from the definition of "alternative fueled vehicle," and the acquisition of such vehicles would not count for compliance purposes under the Act. There is nothing in the text of the Act or its legislative history that indicates an intent to exclude flexible fuel vehicles from DOE's Alternative Fuel Transportation Program. A flexible fuel vehicle, authorized by the manufacturer to operate on an alternative fuel and on gasoline or diesel, clearly fits within the definition of "dual fueled vehicle" in section 301(8).

In response to the comments, DOE has made several changes in the regulatory text to clarify that the statutory term "dual fueled vehicle" includes flexible fuel vehicles. The definition of "dual fueled vehicle" in §490.2 has been revised to expressly include flexible fuel vehicles. A definition of "flexible fuel vehicle" has been added to §490.2. The term is defined as "any motor vehicle engineered and designed to operate on any mixture of two or more different fuels." This definition is taken from EPA's regulation on clean-fuel vehicles, 40 CFR 88.102-94. The definition of "alternative fueled vehicle" in §490.2 also has been revised to clarify that flexible fuel vehicles are included.

Several commenters asked the Department to clarify whether vehicles

that are capable of operating on neat biodiesel and diesel can be considered dual-fueled vehicles. A bi-fuel vehicle that is authorized by the vehicle manufacturer to be operated on neat biodiesel or diesel would meet the definition of a dual-fueled vehicle. A flexible fuel vehicle that is authorized by the vehicle manufacturer to be operated on neat biodiesel or diesel also would meet the definition of a dual-fueled vehicle. These vehicles would meet this definition principally because they are capable of operating on an "alternative fuel" as defined by section 301(2) of the Act, in addition to being operated on a petroleum-based fuel. As explained earlier in the discussion of the definition of "alternative fuel," DOE has conclude that an additional rulemaking is needed to reach a conclusion on which, if any, mixtures of biodiesel should be included in the definition of "alternative fuel." Consequently, until such a rulemaking designates a mixture of biodiesel and diesel as an alternative fuel, a vehicle powered by such a mixture or conventional diesel would not qualify as a "dual fueled vehicle."

Emergency Motor Vehicles. Section 490.2 adopts EPA's definition for the term "emergency vehicle" in 40 CFR §88.302-94. EPA defines "emergency vehicle" to mean any vehicle that is legally authorized by a governmental authority to exceed the speed limit to transport people and equipment to and from situations in which speed is required to save lives or property, such as a rescue vehicle, fire truck or ambulance. These vehicles normally have red and/or blue flashing lights and sirens. DOE is relying on the speed limit

criterion because this is the way that many States define "emergency vehicles."

The Department received comments from utilities asking DOE to determine that vehicles used for emergency restoration of utility service are covered by the definition of "emergency motor vehicles." These vehicles are not normally considered emergency motor vehicles because their primary function does not include exceeding the speed limit to transport people and equipment to and from situations in which speed is required to save lives or property. For this reason, they are not usually equipped with red and/or blue flashing lights and sirens. Emergency power restoration vehicles are not excluded from the definition of "fleet" unless, on a vehicle-by-vehicle basis, they are specifically and legally authorized by a governmental authority to exceed speed limits when responding to emergencies.

Law Enforcement Motor Vehicles. Section 490.2 adopts EPA's definition of the term "law enforcement vehicle" found at 40 CFR §88.302-94. EPA defines "law enforcement vehicle" to mean any vehicle which is primarily operated by a civilian or military police officer or sheriff, or by personnel of the Federal Bureau of Investigation, the Drug Enforcement Administration, or other law enforcement agencies of the Federal Government, or by State highway patrols, municipal law enforcement, or other similar law enforcement agencies, and which is used for the purpose of law enforcement activities including, but not limited to, chase, apprehension, surveillance, or patrol of people engaged in

or potentially engaged in unlawful activities.

This definition is intended to clarify the difference between law enforcement motor vehicles and vehicles used for other security purposes. Under this definition, a vehicle is considered to be a law enforcement motor vehicle by virtue of its use for official law enforcement purposes, as authorized by local, State or Federal government authority. Private security vehicles are not excluded from the definition of "fleet" unless, through a contract or other arrangement, they are used by a law enforcement agency for the purposes described above.

One commenter inquired whether vehicles operated by a State corrections department and used for transport of prisoners or for administrative duties would be considered a "law enforcement motor vehicle." DOE concludes that these vehicles are law enforcement motor vehicles because State corrections departments are engaged in law enforcement activities.

Lease. No comments critical of the definition of "lease" were received. Section 490.2 defines the term "lease" to mean use of a vehicle for transportation purposes pursuant to a rental contract or similar arrangement, and the term of such contract or similar arrangement is for a period of 120 days or more. This definition closely tracks EPA's definition of "owned or operated, leased or otherwise controlled by such person," found at 40 CFR §88.302-94.

Light Duty Vehicle. One commenter inquired whether a vehicle's gross vehicle weight rating is to be determined before or after conversion to operate



on alternative fuel. DOE has determined that the gross vehicle weight rating applies to newly acquired vehicles prior to conversion and has amended the definition of the term "light duty motor vehicle" to reflect this determination.

Model Year. No comments critical of the definition of "model year" were received. Section 490.2 defines the term "model year" for the purposes of vehicle acquisition requirements as September 1 of the previous calendar year through August 31. This definition closely tracks EPA's definition of "model year," found at 40 CFR §88.302-94. The model year, thus defined, coincides with the period in which most automobile manufacturers introduce their new annual models, which should facilitate compliance since covered persons and State fleets can make their acquisition plans regarding alternative fueled vehicles when they make plans for acquiring new model year vehicles. For compliance purposes, the definition of model year is important to ensure that all fleets and covered persons acquire vehicles based on the same annual period. Thus, any new vehicles that are acquired by a fleet or covered person between September 1 and August 31 of the next year are counted and used as the basis for determining the acquisition requirement of the same year.

Motor Vehicle. The notice of proposed rulemaking included the definition of "motor vehicle" in section 301(13) of the Act, 42 U.S.C. 13211(13), which incorporates the definition of "motor vehicle" in section 216(2) of the Clean Air Act, 42 U.S.C. 7550(2). In this rule, DOE has included the text of section 216(2) so that regulated entities will not have to consult another source for the

meaning of this term. A comment was received that requested that non-road vehicles be expressly excluded from the definition of "motor vehicle." The Department has amended the definition of "motor vehicle" to make clear that non-road vehicles are excluded. A definition of "non-road vehicle," which is drawn from section 412(b) of the Act, has been added to this section.

Non-road Vehicle. This term is defined to mean a vehicle not licensed for on-road use, including vehicles used principally for industrial, farming or commercial use, for rail transportation, at an airport, for marine purposes and other vehicles.

Original Equipment Manufacturer Vehicle. Section 490.2 defines the term "Original Equipment Manufacturer Vehicle" to mean a vehicle engineered, designed, produced and warranted by an Original Equipment Manufacturer. This term applies to conventionally fueled Original Equipment Manufacturer vehicles as well as to alternative fueled vehicles. Included in this definition are vehicles that were conventionally fueled Original Equipment Manufacturer vehicles, but were converted prior to sale by the Original Equipment Manufacturer, through a contract with a conversion company, to operate on an alternative fuel and which are covered under the Original Equipment Manufacturer warranty. The proposed definition did not reference Original Equipment Manufacturer warranties. This omission was pointed out by a commenter, and it is corrected in this rule.

Used Primarily. The definitions of the terms "fleet" and "covered person"

include the requirement that a vehicle must be "used primarily" within a metropolitan statistical area to be included in a "fleet." In response to comments requesting clarification the Department has defined "used primarily" to mean that a majority (i.e., over 50 percent) of a vehicle's total annual miles are accumulated within a covered metropolitan statistical or consolidated metropolitan statistical area.

#### Section 490.3 Excluded vehicles.

Section 490.3 sets forth the categories of vehicles that are not counted in determining the existence of a "fleet" as defined in §490.2. Some of the exclusions are discrete categories defined in § 490.2, including "dealer demonstration vehicle," "emergency vehicle," and "law enforcement vehicle."

The statutory definition of "fleet" also excludes motor vehicles held for lease or rental to the general public; motor vehicles used for motor vehicle manufacturer product evaluations or tests; motor vehicles which under normal operations are garaged at personal residences at night; and motor vehicles that the Secretary of Defense certifies must be exempt for national security reasons. This latter category was not subject to public comment and is self-explanatory. The other categories, however, either were subject to comment or require some explanation.

DOE has adopted EPA's interpretation of "motor vehicles held for lease or rental to the general public." EPA interprets the phrase to mean a vehicle that is owned or controlled primarily for the purpose of short-term rental or

extended-term leasing, without a driver, pursuant to a contract. 40 CFR §88.302-94. Under this definition, a firm will not be found to "lease" its vehicles to its employees unless the vehicles are owned primarily for leasing them to the general public and they are leased pursuant to formal contracts which give control of the vehicle to the lessee. No critical comments were received on this interpretation.

DOE also has adopted EPA's interpretation of "motor vehicles used for motor vehicle manufacturer product evaluations and tests," which are excluded from the definition of "fleet." Section 490.3 follows EPA's definition of the phrase "vehicle used for motor vehicle manufacturer product evaluations and tests" at 40 CFR § 88.302-94. It is the intent of this provision to exclude vehicles which are used by an Original Equipment Manufacturer for production control or quality control reasons. No critical comments were received on this interpretation.

DOE has only partially adopted EPA's definition of "motor vehicles which under normal operations are garaged at personal residences at night." The notice of proposed rulemaking included this statutory language in §490.2. A number of commenters criticized DOE for not adopting all of EPA's definitions, and one commenter specifically urged DOE to adopt EPA's definition of this phrase. EPA defined the nearly identical statutory language to mean "a vehicle that, when it is not in use, is normally parked at the personal residence of the individual who usually operates it, rather than at a central refueling,

maintenance, and/or business location." 40 CFR § 88.302-94. EPA concluded that the words "at night" in section 241(6) of the Clean Air Act did not preclude extending the exclusion to persons who work at night. 58 FR 64679, 64690. DOE believes that this is a reasonable interpretation of the statutory phrase and, in light of the comments urging consistency in definitions, has decided to adopt the EPA language in §490.2.

A few commenters also pointed out that some vehicles that are garaged at personal residences of employees overnight are in fact centrally fueled, and they urged DOE not to exclude such vehicles from a "fleet." EPA, in its definition, did not exclude a vehicle that was in fact centrally fueled, because the relevant Clean Air Act provision refers only to a vehicle which "is capable of being centrally fueled." 58 FR 64679, 64690. By contrast, the definition of "fleet" in section 301(9) of the Act excludes a vehicle garaged at a personal residence from the definition, regardless of whether it is centrally fueled or capable of being centrally fueled. Therefore, DOE has not adopted that portion of EPA's definition.

Fleet operators and covered persons should subtract vehicles in these excluded categories from the total number of new light duty vehicles to be acquired in a model year to determine the basis for calculating the number of alternative fueled vehicles they are required to acquire in the model year.

**Example:** A covered person is going to acquire 105 new light duty

vehicles in model year 1997. Of these 105 vehicles, five are vehicles in excluded categories. To determine how many alternative fueled vehicles must be acquired the covered person shall make the following calculation:  $[(\text{Number of new light duty vehicles to be acquired}) - (\text{Number of new light duty vehicles in excluded categories})] \times (\text{Acquisition percentage for that model year})$ . In this example, the covered person is required to acquire 30 alternative fueled vehicles in model year 1997  $\{[(105) - (5)] \times (.30) = 30\}$ .

#### Section 490.5 Requests for an interpretive ruling.

Section 490.5 establishes a process for States and covered persons to obtain DOE interpretive rulings as to how the Department intends to construe and apply its regulations to particular factual situations, and for whom other procedures such as petitions for exemption are irrelevant. One commenter objected to this provision, stating that it will lead to inconsistencies in implementation. DOE does not agree with this comment. Publicly available interpretive rulings should promote uniformity in implementation, even though any interpretive ruling that the Department issues would apply only to the person who requested it.

#### Section 490.7 Relationship to other law.

Section 490.7 makes a declaratory statement to avoid arguments that provisions of part 490, by implication, authorize acquisition of vehicles, conversion of vehicles, or use of fuels as motor fuel in a manner that does not comply with other Federal, State, or local laws.

**Subpart B -- [Reserved]**

**Subpart C -- Mandatory State Fleet Program**

Section 490.201 Alternative fueled vehicle acquisition mandate schedule.

Section 490.201 sets forth the requirements, subject to some exemptions, for the percentage of new light duty motor vehicles that must be alternative fueled vehicles when acquired for State fleets under the Mandatory State Fleet Program.

In response to comments that inquired about what would happen if a State agency grew in size or moved its vehicle operations to one of the MSAs listed in Appendix A to subpart A, the Department has added paragraph (d). Paragraph (d) states that if, in the future, a State agency becomes subject to this subpart because it owns, operates or controls a fleet, the State agency shall start acquiring alternative fueled vehicles according to the schedule percentage in effect for the next model year. For example, if a State agency first owns, operates or controls a fleet in model year 1998, then for model year

1999, 25 percent of the State agency's new light duty motor vehicles acquired for its fleet should be alternative fueled vehicles. However, paragraph (d) also recognizes that, in some cases, State agencies that are newly required to acquire alternative fueled vehicles may qualify under section 490.204 for an exemption or reduction of the acquisition percentage.

One commenter questioned the rounding convention in the proposed rule for calculating acquisition requirements. After reconsidering this issue, DOE has revised paragraph (c) to provide for rounding up or down to the next whole number, depending on whether the fraction is equal to or greater than one half or is less than one half.

#### Section 490.202 Acquisitions satisfying the mandate.

Section 490.202 provides in substance that an acquisition of an alternative fueled vehicle, regardless of the year of manufacture, counts toward satisfaction of the vehicle acquisition mandate. Such a vehicle would be new to the fleet operator. Credits acquired under subpart F also count toward satisfaction of the mandate.

DOE received many comments opposed to the proposed rule's requirement that new vehicles must be converted before they are placed into service in a fleet. The Department has revised § 490.202(a) to allow States and State agencies to convert newly acquired Original Equipment Manufacturer



vehicles within four months after vehicle acquisition. The basis for the 4-month period for conversion of newly acquired vehicles is explained in the discussion of § 490.305 in this Supplementary Information section. Section 490.305 applies to covered fuel providers, but its provisions are the same as those in § 490.202. Many fuel providers also objected to the proposal to require vehicles to be converted prior to being placed into service in a fleet and, to avoid redundancy, DOE addresses all of the comments on this issue in the discussion of § 490.305.

The Department would prefer that these vehicles be converted in the same model year that they are acquired, but realizes that this is not always possible. Thus, a vehicle acquired in MY 1997 could be converted during MY 1998 (beginning on September 1, 1997), and count towards compliance in MY 1997, if the conversion occurred within four months of the vehicle's acquisition. However, those conversions could not be counted for compliance with the MY 1998 requirements.

A few comments pointed out that the proposed rule did not include any statement about a State not being required to acquire converted vehicles, as provided in section 507(j) of the Act. The Department has not revised the rule in response to these comments because it sees no need to restate the statutory provision in this final rule.

Many commenters requested that the Department allow the conversion of vehicles already in service in a fleet to count towards compliance once the

rule goes into effect. The proposed rule would not have allowed the conversion of existing fleet vehicles to count. Upon further analysis, the Department has decided that it was correct in **not** allowing these vehicles to count towards compliance. Section 507(o) specifically refers to "... percentages of new light duty motor vehicles acquired annually..." 42 U.S.C. 13257(o) (emphasis added). The Act's focus on vehicles new to the regulated entity indicates a congressional intent to regulate inventory turnover and stimulate production of new alternative fueled vehicles. Conversion of existing fleet vehicles could seriously undermine those goals.

Although conversion of an existing fleet vehicle does not qualify as an acquisition under the Act, DOE (as explained in the discussion of §490.502 in Subpart F) will allocate credits for motor vehicles that were purchased or leased by regulated entities on or after October 24, 1992, and converted to alternative fueled vehicles before the effective date of the applicable acquisition requirements. For purposes of calculating credits, DOE will not apply the four-month time limit to conversions that occurred before the effective date of this rule.

#### Section 490.203 Light Duty Alternative Fueled Vehicle Plan

The Act provides an alternative means of compliance for States. In lieu of a State meeting the acquisition requirements of § 490.201 solely through

State acquisitions, a State may comply with a Light Duty Alternative Fueled Vehicle Plan submitted by the State and approved by DOE. Under such an alternative compliance plan, a State may satisfy its acquisition requirements with the voluntary participation of non-covered State, municipal, and private fleets. However, section 507(o)(2)(A) of the Act states that any State plan must provide for the acquisition of light duty motor vehicles by State, local and private fleets, which in aggregate meet or exceed the applicable vehicle percentage for any given model year.

Section 490.203(3) provides that any acquisition of light duty alternative fueled vehicles for a State may be part of the Plan, irrespective of whether the vehicles are in the categories of vehicles excluded from the definition of "fleet," as enumerated in § 490.3. This allows for law enforcement vehicles, or other vehicles excluded from the definition of "fleet" to be part of a Light Duty Alternative Fueled Vehicle Plan.

Unless covered by an exemption, a State is subject to the requirements in § 490.201. A State also may be required to comply with the requirements of § 490.201 if a State plan participant (such as a municipality) fails to fulfill its commitments under the Plan. However, if the State is able to find a substitute participant, then the State may submit to DOE for approval an amendment to the Plan.

Paragraph (b) of this section requires States to monitor and verify on an ongoing basis the implementation of its Plan. This is to ensure that all

participants in the Plan are indeed in compliance, and that at the end of the model year, all requirements will have been met. If for whatever reasons a participant is unable to fulfill its commitments, the State is obligated to find a substitute participant before the end of the year.

Paragraph (c) establishes a general requirement that a State must submit to DOE, for approval, its Light Duty Alternative Fueled Vehicle Plan no later than the June 1 prior to the model year(s) covered by the Plan. However, because section 507(o)(2)(A) of the Act specifies that States may submit their Plan to the Department within 12 months after final rule promulgation, DOE will not require States to submit a Plan for model year 1996, and a plan for model year 1997 may be submitted by **[12 months after publication of this rule]**. After MY 1997, the Department believes that a State should know by June 1 the number and type of light duty motor vehicles it plans to acquire during the upcoming model year and should have begun the procurement process for these vehicles.

A few commenters requested that States opting to comply through these alternative compliance plans be allowed to use gallons of petroleum displaced, instead of alternative fueled vehicles acquired, as the measure of compliance. DOE has not adopted this recommendation because section 507(o)(2)(A) requires each State alternative compliance plan to provide for the acquisition of light duty motor vehicles "in numbers greater than or equal to the number of State alternative fueled vehicles required pursuant to [the acquisition schedule

in section 507(o)(1)]." Thus, DOE may not adopt a petroleum displacement standard, in lieu of requiring alternative fueled vehicle acquisitions, for compliance under State alternative compliance plans.

Other comments asked DOE to clarify the meaning of "voluntary" acquisition. DOE has determined that "voluntary" acquisition occurs when an entity, that is not required by the Act to acquire alternative fueled vehicles, acquires alternative fueled vehicles. Because municipalities and private companies, other than those determined to be covered persons subject to the requirements under section 501, are not currently required to acquire alternative fueled vehicles, any acquisition of alternative fueled vehicles by these entities would be voluntary. In addition, the acquisition of alternative fueled vehicles by a State agency that is not an operator of a "fleet," because it does not operate at least 20 vehicles in any of the MSAs/CMSAs found in Appendix A to subpart A, would be voluntary. The acquisition of vehicles in categories of excluded vehicles under §490.3 also would be voluntary.

A few comments raised the possibility of double counting of vehicles by private and local government fleets, when and if they are required to acquire alternative fueled vehicles under a future rulemaking under section 507(b) or (g) of the Act. The possibility of the future allocation of credits for acquisitions by municipal and private fleets depends upon a DOE finding, by rule, that a municipal or private fleet program is necessary to meet the Act's fuel replacement goals. 42 U.S.C. 13257(b), (e), (f). DOE has not begun a

rulemaking to determine whether to make such a finding. Initiation of such a program is not a foregone conclusion. Therefore, participation in a State alternative compliance plan will not conflict with any present, and possibly future, compliance obligations under the Act.

#### Section 490.204 Process for granting exemptions.

Section 507 (i)(1) of the Act provides that a State may seek exemptions in whole or in part from the annual acquisition percentages in three situations. As interpreted in this final rule, a State may seek exemption if it can demonstrate that--

(1) Alternative fuels that meet the normal requirements and practices of the principal business of the State fleet are not available from fueling sites that will allow the fleet to be centrally fueled in the area where the vehicles are to be operated; or

(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the State fleet are not available for sale or lease commercially on reasonable terms and conditions within the State; or

(3) The application of such requirements would pose an unreasonable financial hardship.

Categories 1 and 2 basically track section 507(i)(1)(A) and (B) of the Act. DOE is aware that all domestic Original Equipment Manufacturers sell or lease vehicles to fleets exclusively through their dealerships, the only exception being

fleet sales to the Federal government. Other Original Equipment Manufacturers, such as vehicle manufacturers that do not belong to the American Automobile Manufacturers Association, sell or lease their vehicles directly to the customer without the benefit of a motor vehicle dealer network.

Thus, to receive an exemption based on vehicle unavailability, a State must show that no Original Equipment Manufacturer can deliver alternative fueled vehicles to a State fleet on reasonable terms and conditions that meet the normal requirements and practices of the principal business of the fleet. An applicant for an exemption must establish vehicle unavailability by submitting documentation from vehicle manufacturers or from motor vehicle dealers, as appropriate to its situation. Documentation requirements are explained in the discussion of § 490.308 in this Supplementary Information section.

Comments received from State and local governments and fleet managers regarding the process for granting exemptions because of the unavailability of alternative fueled vehicles or alternative fuels are addressed in the discussion of § 490.308, which deals with exemptions for covered alternative fuel providers. The same statutory criteria apply to granting exemptions to State government fleets (under § 490.204) and to covered fuel providers (under § 490.308) when alternative fueled vehicles or alternative fuels are not available. Therefore, there is no need to duplicate the discussion of the comments and the approach that DOE will take in granting exemptions in these situations.

Regarding category 3, section 507(i)(1)(C) allows States to request an exemption based on unreasonable financial hardship. Some commenters requested clarification as to what qualifies as unreasonable financial hardship. Many of these same commenters suggested the circumstances that should qualify as a financial hardship. Some commenters recommended using a life-cycle cost analysis to determine financial hardship and provided the cost premium and payback period that should be used. One State provided a formula and specific examples of how to use the formula in different circumstances. Some commenters recommended that a financial hardship exemption be granted if an alternative fueled vehicle's initial cost was some factor greater than the cost of a conventionally fueled vehicle. A commenter recommended tying a financial hardship exemption to the national inflation rate. Other commenters suggested that financial hardship should be recognized if the requirements cause more than a specified percentage increase in the total fleet's annual budget. Another commenter suggested that if a State is required to build a fueling facility, a financial hardship exemption should be granted.

The Department has carefully reviewed all of the comments on this issue and has concluded that "unreasonable financial hardship," as used in section 507(i)(1)(C) of the Act, must be determined on a case-by-case basis. The relevant conditions in States, such as the availability and cost of alternative fuel, will vary at any point in time. Therefore, it is not possible to determine now, by rule, that all States will experience unreasonable financial hardship at some



time in the future if, for example, the cost of alternative fueled vehicles is a certain percentage or amount above the cost of conventionally-fueled vehicles.

DOE will evaluate financial hardship exemption requests in light of the budget constraints in the applicant State. For example, some States have multi-year budgets, and funding for the acquisition of alternative fueled vehicles may be insufficient in some model year. That is a situation in which DOE would likely grant at least a partial exemption from the requirements based on financial hardship.

DOE received comments requesting confirmation that partial exemptions may be granted and how they might affect future vehicle purchases. In response, the Department added paragraph (d) which states that exemptions may be granted in whole or in part to a State. When granting an exemption in part, DOE may, depending upon the circumstances, completely relieve a State from a portion of the vehicle acquisition requirements for a model year or require a State to acquire all or some of the exempted vehicles in future years.

Paragraph (g) provides that the Assistant Secretary for Energy Efficiency and Renewable Energy shall grant or deny a request for exemption within 45 days. In order to keep the procedures simple, the Assistant Secretary may act finally for the Department, and there is no requirement to obtain the specific approval of the Secretary. If the Assistant Secretary denies the request for exemption, paragraph (h) further provides that a State may appeal to the Department's Office of Hearings and Appeals, whose decision would be final for

the purpose of judicial review. Further discussion on the exemption process is found in section-by-section analysis for the Alternative Fuel Provider Vehicle Acquisition Mandate.

#### Section 490.205 Reporting requirements.

Section 490.205 requires each State that is subject to the vehicle acquisition mandate to submit an annual report to DOE. This report will assist DOE to determine if a State has met the requirements of this subpart as well as how successfully the goals and requirements of this subpart are being met. One commenter suggested that DOE should require States and fuel providers to report whether a vehicle is dedicated or dual-fueled and the type of fuel the vehicle is capable of operating on. The Department has adopted this recommendation, in new subparagraphs (b)(5)(iv) and (v), because it agrees that this information is needed to assist DOE in carrying out its responsibilities under title V.

DOE received several comments regarding the definition of a State fleet. Some of these comments suggested specific agencies' fleets that should be included in a State fleet. The most common suggestion was that State university and college fleets should be included. Other comments suggested characteristics of agencies for the purpose of determining whether the fleets of these agencies should be classified as a State fleet. A few of the comments

suggested that the determination of which agencies are to be included in a State fleet be left up to each individual State.

Based on these comments, DOE has decided to allow each State to determine for itself which agencies operate or control a State fleet for reporting purposes. However, DOE will expect States to follow the common understanding of what constitutes a "State agency." State agencies are usually authorized and funded by the State legislature, receive funding from the State budget, or are situated on State property. Examples of agencies that DOE expects to be classified as State agencies are departments, offices and divisions of State government, State colleges and universities, port authorities, and other State entities.

In addition to allowing States to determine initially which agencies are State agencies, DOE is giving States some leeway in how they report the alternative fueled vehicle acquisitions of the State agencies. Although DOE would prefer one report from each State that aggregates the State's alternative fueled vehicle acquisitions, it is aware that some States may have difficulty aggregating these numbers due to the unique structure of each State. In place of one aggregate report for a State, a State may assign a limited number of State agencies the task of preparing the individual reports for many other State agencies. For example, a State division of general services might prepare and submit the report for its fleet along with reports from the State universities and the State port authority. The State would then submit these separate reports to

DOE as its annual report. DOE believes these reporting options will lessen the burden on the States.

For further discussion on reporting requirements, see section 490.309.

## **Subpart D -- Alternative Fuel Provider Vehicle Acquisition**

### **Mandate**

#### **I. Which alternative fuel providers must comply with the alternative fueled vehicle acquisition mandate.**

The Energy Policy Act of 1992 defines the class of alternative fuel providers potentially subject to the alternative fueled vehicle acquisition requirements to include persons who qualify as a "covered person" under section 301(5) of the Act, 42 U.S.C. 13211(5), and fall within one of the categories of covered alternative fuel providers in section 501(a)(2). 42 U.S.C. 13251(a)(2). The term "covered person" is defined in section 301(5) to mean a person that owns, operates, leases, or otherwise controls a "fleet" (defined at § 490.2) and a total of at least 50 motor vehicles within the United States. Paragraph (a)(2) of section 501 describes the categories of covered persons subject to the requirements as follows:

(A) a covered person, whose principal business is producing, storing,

refining, processing, transporting, distributing, importing, or selling at wholesale or retail any alternative fuel other than electricity;

(B) a non-Federal covered person whose principal business is generating, transmitting, importing, or selling at wholesale or retail electricity; or

(C) a covered person --

(i) who produces, imports, or produces and imports in combination, an average of 50,000 barrels per day or more of petroleum; and

(ii) a substantial portion of whose business is producing alternative fuels.

42 U.S.C. 13251(a)(2). The final rule interprets the phrase "principal business" at § 490.301.

As illustrated in the Appendix to this Supplementary Information, even if an entity meets all of the qualifications for a covered alternative fuel provider under section 501(a)(2), it nevertheless may be excepted from the vehicle acquisition requirements under section 501(a)(3) or exempted by DOE under section 501(a)(5). Under section 501(a)(3)(A), the vehicle acquisition requirements only apply to an affiliate, division or business unit of a covered person that is substantially engaged in the alternative fuels business. *See* § 490.304 (*see also* § 490.301 for definition of "substantially engaged"). Moreover, under section 501(a)(3)(B), the vehicle acquisition requirements do not apply to any entity whose principal business is transforming alternative fuel into a

product other than alternative fuel or consuming such fuel to manufacture a product that is not an alternative fuel. Under section 501(a)(5), DOE may exempt alternative fuel providers from the vehicle acquisition requirements if they can show either that (1) alternative fuels that meet their normal business requirements and practices are not available; or (2) that alternative fueled vehicles that meet their normal business requirements and practices are not offered for purchase or lease on reasonable terms and conditions. *See* § 490.308.

The term "substantial portion" in section 501(a)(2)(C) is a key statutory determinant of whether a covered person that produces or imports petroleum is an alternative fuel provider required to acquire alternative fueled vehicles. Section 490.301 defines the term "substantial portion" to mean that at least 30 percent of a covered person's annual gross revenue is derived from the sale of alternative fuels. This definition is different from the one included in DOE's notice of proposed rulemaking.

In its notice of proposed rulemaking, DOE defined the term "substantial portion" to mean that at least two percent of a covered person's refinery yield of petroleum products is composed of alternative fuels. DOE explained that it chose the two percent of refinery yield threshold because it represented the average yield for the production of alternative fuels by petroleum refiners, as reported by the Energy Information Administration. 60 FR 10978. DOE received many comments that criticized the proposed definition of "substantial

portion." They argued that the two percent of refinery yield was too low a threshold for classifying an entity as a "covered person." Some commenters stated that the two percent refinery yield of petroleum products would impose vehicle acquisition requirements on many refineries that only produce alternative fuels as incidental by-products of the refining process, and that the alternative fuel so produced is not sold as motor fuel. A few of the comments recommended that DOE adopt a percentage of gross revenue derived from the sale of alternative fuels as the basis for the definition of "substantial portion." They pointed out that gross revenue is the measure used for determining whether other alternative fuel providers are "covered persons" because their principal business is in alternative fuels. In their view, if gross revenue is used to determine whether an entity's principal business involves alternative fuels, it also should be used for determining whether a petroleum producer or importer has a substantial portion of its business in the production of alternative fuels.

After reviewing these comments, DOE published a notice on July 31, 1995, reopening the comment period to receive public comments on alternative definitions of the term "substantial portion." 60 F.R. 38974 (*corrected* 60 F.R. 40539, Aug. 9, 1995). DOE stated that it was persuaded by the comments that a percentage of gross revenue derived from the sale of alternative fuels may be a better measure of an entity's involvement in the alternative fuels business than is a percentage of refinery yield of petroleum products. As pointed out by some commenters, a gross revenue measure can be applied to all producers

and importers of petroleum, unlike the percent of refinery yield measure which focuses solely on refining operations.

DOE also invited public comment specifically on the alternative of defining "substantial portion" to mean that at least 30 percent of the annual gross revenue of a covered person is derived from the sale of alternative fuels. DOE stated that this percentage of gross revenue appeared to be an appropriate gross revenue threshold for two reasons. First, available information shows that major U.S. energy producing companies historically derive at least 30 percent of their annual gross revenue from the sale of alternative fuels. Major energy producers are typically consolidated or integrated companies that are involved in oil and gas exploration, oil and gas production or importing, petroleum refining and marketing, transportation of products, other energy operations (coal, nuclear and other energy) and non-energy businesses (primarily chemicals). Second, this definition would exclude from the class of covered persons subject to the vehicle acquisition requirements those refiners involved only in petroleum refining and marketing operations and that produce alternative fuels as an incidental by-product of the refining process. DOE specifically requested interested persons to submit data or analysis relevant to this issue.

DOE received approximately 20 comments on the notice inviting comment on possible alternative definitions of "substantial portion." Two commenters argued strenuously that DOE should adhere to the 2% of refinery



yield threshold for determining which companies are covered persons. In their view, the 30% gross revenue threshold will exempt too many refineries and, thus, compromise the Act's goal of reducing the nation's dependency on foreign oil. Several petroleum refiners and marketers expressed support for the 30% gross revenue threshold. They stated that the 30% gross revenue test properly describes the class of producers and importers of petroleum that Congress intended to be covered alternative fuel providers.

Several other commenters stated that a 30% of gross revenue threshold is still too expansive. Their principal argument is that Congress intended the alternative fueled vehicle mandates to apply only to entities that deal directly in alternative fuels that are intended for use as motor fuel. One commenter, for example, argued that any definition of "substantial portion" must exclude materials that are not sold directly as transportation fuel, such as non-compressed natural gas or other materials that must be chemically or physically altered to be used as transportation fuel. Another commenter stated that the sale of a commodity such as natural gas does not constitute the sale of an "alternative fuel" for transportation purposes. This commenter further stated that because even compressed natural gas has several uses, only the sale of compressed natural gas for use in the storage compartment of a motor vehicle would constitute the sale of "alternative fuel" under the Act.

After reviewing the comments on this issue and having analyzed the statutory text and its legislative history, DOE has concluded for a variety of

reasons that the Act may not be interpreted to limit the alternative fueled vehicle acquisition mandate to entities that deal directly in alternative fuel which is intended for use as motor fuel. First, section 301 defines "alternative fuel" to include various materials, including natural gas and electricity, but it does not limit the term to fuel produced or handled for transportation purposes. In this regard, it is significant that "natural gas," rather than "compressed natural gas" is included in the definition of "alternative fuel." Second, section 501(a), which imposes the alternative fueled vehicle acquisition requirements on fuel providers, does not expressly limit coverage to entities that deal in alternative fuel for transportation purposes. Third, the exemptions provided in section 501(a)(3)(B) necessarily imply that Congress did not intend to limit the vehicle acquisition requirements to entities that directly deal in motor fuels. That section exempts entities whose principal business is "transforming alternative fuels into a product that is not an alternative fuel" or "consuming alternative fuels as a feedstock or fuel in the manufacture of a product that is not an alternative fuel." These exemptions show that Congress expressly addressed the question of whether there should be an exemption based upon the use of an "alternative fuel." The specification of the two particular exemptions based upon use in a section that elaborately details exceptions implies that Congress did not intend to create, or authorize DOE to create, an exception for all uses of alternative fuels other than transportation purposes.

In addition, the legislative history of the Act is contrary to the

interpretation recommended by the petroleum company commenters. The most authoritative source regarding Congress' intent in enacting section 501 is the Conference Report on the Act. That report's only discussion of title V of the Act, the alternative fuels title, deals with precisely this issue:

"The intent of section 501(a)(1) is not to cover all affiliates or divisions of the many large energy companies which have some, but not all, of their corporate units engaged in alternative fuels operations.

"For example, the oil and gas production affiliate or division of a major energy company described in 501(a)(1)(C) would be covered; so might a propane pipeline unit or a natural gas processing division, if the 'substantially engaged' test is met.

"But an oil tanker division, a gasoline marketing affiliate, or a petrochemical unit whose major operations are the production of plastics, for example, would not be covered.

"The Secretary has broad discretion to define the coverage of this provision. For example, he may in his discretion exempt some crude oil-related operations of an oil and gas production affiliate (but not the gas-related operations), or the petrochemical operations of a covered methanol unit (but not the methanol-related business)."

H.R. Rep. 102-1018, 102d Cong., 2d Sess. 387 (1992).

There is no relevant Senate report language. However, the House report on H.R. 776 contains the following explanation of the fuel provider alternative fueled vehicle acquisition mandate, which sheds additional light on the question of whether Congress intended to limit the terms "substantial portion" and "alternative fuel" to fuels only used for transportation purposes:

"The program applies to firms owning, for example, natural gas pipelines or methanol plants. Their ready access to alternative fuel supplies and their profit motive for developing a growing AFV market makes them an excellent starting point for a successful transition to alternative fuels."

H.R. Rep. 102-474, 102d Cong., 2d Sess. 187 (1992).

Thus, the relevant conference and committee reports clearly show that Congress foresaw coverage of some oil and gas production affiliates, propane pipeline units, and natural gas processing divisions.

The commenters arguing for a limiting interpretation of "substantial portion" or "alternative fuel" neither relied on any phrase in the statutory text, nor cited any parts of the above-referenced legislative reports, to support their narrow interpretation of these terms. They relied almost entirely upon floor statements of individual Members of Congress, quoted out of context, which only show that those Members expected the Act to stimulate the development of an alternative fueled vehicle market by various incentives and mandates designed to encourage the replacement of gasoline with alternative transportation fuels. None of the floor statements show an intent to limit the

term "alternative fuel" to transportation fuel, or "substantial portion" to fuel providers exclusively in the alternative transportation fuel business. In comparison to the above-discussed statutory text and report language, the relevance of these floor statements to this question is marginal at best.

A few commenters argued that besides limiting "covered persons" to entities that directly deal in motor fuel, DOE should adopt a percentage of gross revenue that is higher than 30 percent. One commenter argued that if 30 percent of gross revenue represents the lowest expected alternative fuel activity of major energy producers, then the gross revenue percentage included in the definition of "substantial portion" should be raised to exceed the average of all major energy producers. However, none of the comments provided information that contradicts DOE's conclusion that major energy companies historically derive at least 30 percent of their gross revenue from the sale of alternative fuels. For the reasons given in its July 31, 1995 notice (60 F.R. 38974), DOE concludes that 30 percent of annual gross revenue derived from the sale of alternative fuels satisfies the "substantial portion" test contained in section 501(a)(2)(C)(ii) of the Act.

A few commenters objected to a percentage of gross revenue measure to determine "substantial portion" on the ground that it would be more complicated to implement than other measures. One of their main concerns was that DOE may require covered companies to disclose confidential information or institute new accounting systems. DOE does not foresee such a

result; instead, it believes coverage can be determined from existing public documents. As several commenters requested, this determination will normally be made using information found in an annual report or an annual Form 10-K report filed with the Securities and Exchange Commission by covered persons.

## **2. Section-by-Section Discussion**

This section discusses comments on specific provisions of subpart D. DOE has also included explanations of some provisions that were not the subject of comment where it believes explanations will assist regulated entities to comply with this subpart. Some nonsubstantive changes from the notice of proposed rulemaking, such as renumbering of rule provisions and nonsubstantive language changes, are not discussed.

Section 490.301 Definitions.

Affiliate, Business Unit, and Division. Section 490.301 provides definitions for the terms "affiliate," "division," and "business unit" which are used in section 501 of the Act. The first two are dictionary definitions. "Business unit" is defined to make clear the grouping of business activities must be similar in autonomy to affiliates and divisions. Based on comments, language has been added to the definitions of "business unit" and "division" to include the

concept of control. One commenter argued that "affiliate" should be defined as an entity below the covered person in a corporate structure. DOE has not changed the definition to adopt this narrow interpretation of the meaning of "affiliate" because there is no reason to believe that Congress intended DOE to define "affiliate" at variance with normal usage.

Alternative Fuels Business. Section 490.301 contains a definition of the term "alternative fuels business" which tracks the language of section 501(a)(2). No comments specifically critical of this definition were received.

Normal Requirements and Practices. Section 490.301 defines the term "normal requirements and practices" to mean the operating business practices and required conditions under which the principal business of the covered person operates. Several comments were received on this definition. They are addressed in the discussion of section 490.308, which deals with exemptions based on the unavailability of alternative fuel or alternative fueled vehicles.

Principal Business. No comments specifically critical of this definition were received. Section 490.301 defines the term "principal business" to mean the largest sales-related gross revenue producing activity. If an organization derives a plurality of gross revenue from sales-related alternative fuels activity, then the organization's principal business is alternative fuels. Sales-related in this context means that the gross revenue does not come from investments such as corporate stocks. As it is used above, plurality does not require that over 50 percent of an organization's sales-related gross revenue be based on

activities related to alternative fuels. For example, if an organization derives 35 percent of its sales-related gross revenue from alternative fuels and the next largest single source of sales-related gross revenue comprises 25 percent of the organization's gross revenue, the organization's principal business is alternative fuels.

Substantially Engaged. Section 490.301 defines the term "substantially engaged" to mean that a covered person, or affiliate, division, or other business unit thereof, regularly derives sales-related gross revenue from an alternative fuels business. To determine whether a covered person or affiliate, division, or other business unit thereof is "substantially engaged" in the alternative fuels business, it is important to look at the involvement the covered person, affiliate, division, or other business unit has with the alternative fuels business. Thus, only that affiliate, division, or business unit that meets the substantially engaged criteria is subject to the acquisition requirements of this program. A comment was received that asked DOE not to include business units engaged in alternative fuel production activities that are incidental to a company's principal business in this definition. An example given was of a covered fuel provider whose principal business is manufacturing denatured ethanol, but which also operates a chain of camping stores that regularly sells one-liter bottles of propane for use with camping stoves. The Department would not consider that division to be substantially engaged in the alternative fuels business if the sale of propane contributes only an incidental or insignificant amount of the gross



revenue of the chain of stores. DOE does not think this type of situation is likely to arise. Business units of covered persons that already have been determined to be in the alternative fuels business, and which regularly derive revenue from an alternative fuel business, will normally be substantially engaged in alternative fuels. If rare situations arise in which that is not the case, DOE can address them through case-by-case interpretations. Nonetheless, in light of the comment, DOE has revised the definition of "substantially engaged" to clarify that a business unit will not be subject to acquisition requirements if it only derives a negligible amount of revenue from alternative fuels.

The covered person is responsible for clearly defining the specific affiliate, division, or other business unit that is substantially engaged and is therefore subject to the acquisition requirements of this rule. If this designation is not made or is not made clearly, DOE will assume that the entire organization is subject to the acquisition requirements of this rule and will enforce it as such.

#### Section 490.302 Vehicle Acquisition Mandate Schedule

Section 490.302 sets forth the schedule for the acquisition of light duty motor vehicles which alternative fuel providers must comply with if they are classified as covered persons subject to the requirements.

One commenter argued that calendar years should be used instead of model years in the schedule in paragraph (a). Section 501 specifically requires acquisition on a model year basis. The Department has not changed the time frame for vehicle acquisition.

Paragraph (b) states that, except as provided by section 490.304, these requirements apply to **all** new light duty vehicles acquired by those business units of covered persons that are substantially engaged in the alternative fuels business, not just those vehicles acquired for the fleets which initially qualified the alternative fuel provider as a subject "covered person." These requirements also apply regardless of where the new vehicles are to be located. For example, if an alternative fuel provider, that is a covered person, is acquiring new light duty motor vehicles for locations that are not within MSAs or CMSAs, these vehicles must be added to those to be acquired for the subject MSA/CMSAs before applying the applicable percentage in paragraph (a) to determine how many of these vehicles must be alternative fueled vehicles.

DOE received many requests to narrow the acquisition requirements to only vehicles acquired for use by fleets in the MSA/CMSAs listed in Appendix A to subpart A. Some commenters stated that DOE has misinterpreted the Act's requirements for "covered persons" by concluding that all new light duty vehicles acquired by covered fuel providers must be included in the base for determining the number of alternative fueled vehicles to be acquired in a model year, regardless of whether the vehicles will be operated in fleets in

MSAs/CMSAs. These commenters argued that because Congress defined "covered person" as a person that owns or otherwise controls a "fleet," which in turn is defined to include only vehicles operated in an MSA or CMSA, Congress intended the MSA/CMSA to be the basic defining criteria for the acquisition requirements. These commenters also discerned no reason why Congress would impose a greater burden on fuel providers than on States. "Covered person," in their view, is simply used in the Act as a convenient way of referring to covered fuel providers.

Electric utilities argued that the acquisition requirements should be limited, as a matter of policy, to fleets operated in MSAs/CMSAs. These commenters stated that forcing covered utilities to purchase alternative fueled vehicles in rural areas, where the alternative fuels infrastructure does not exist, is impractical and likely to undermine development of alternative fueled fleets in urban areas. They stated that there are not likely to be enough electric vehicles to supply both areas, and electric vehicles are not suited for operation in many rural areas because of climate, terrain, and vehicle operational requirements.

DOE does not agree with comments arguing that it has misconstrued the provisions of the Act. Section 501(a) states unambiguously that the acquisition schedules apply to "the new light duty motor vehicles acquired by a covered person." By contrast, the phrase "for a fleet" is used throughout section 507 in reference to the vehicle acquisition mandates for State, local, and private fleets.

The phrase "for a fleet" is not found in section 501. DOE also disagrees with commenters who stated that Congress could not have intended to impose different acquisition requirements on States and alternative fuel providers. The legislative history shows that Congress included a fuel provider mandate because of fuel providers' "ready access to alternative fuel supplies." *See* Report on H.R. 776, The Comprehensive National Energy Policy Act, H.R. Rep. 102-474, 102 Cong. 2d Sess. 197 (1992).

DOE has not, therefore, revised paragraph (b) of § 490.302 as requested by these commenters. Nevertheless, DOE recognizes the legitimate concerns of covered persons about acquisition of alternative fueled vehicles in areas outside of the MSAs/CMSAs listed in Appendix A of subpart A. DOE believes the Act and the final rule provide adequate means of providing relief from the requirements when it is justified. As discussed in connection with § 490.308, section 501(a)(5) of the Act prescribes a "simple and reasonable" process for granting an exemption from the acquisition requirements if either alternative fueled vehicles or alternative fuels that meet "the normal requirements and practices of the principal business of [the covered person]" are not available in the area in which the vehicles are to be operated. 42 U.S.C. 13251(a)(5). In revising § 490.308, DOE has added a central fueling criterion and simplified the process for obtaining an exemption for any covered person whose vehicles are located outside of MSAs/CMSAs. An exemption will be granted if the covered person can show that central fueling does not meet the normal requirements

and practices of that person's principal business. In areas outside of MSAs/CMSAs, the covered person is not required to map the location of vehicles operational areas and alternative fuel sites if facts can otherwise be presented to establish that central fueling is incompatible with its normal requirements and practices.

One commenter questioned the rounding convention in the proposed rule for calculating acquisition requirements. After reconsidering this issue, DOE has revised paragraph (c) to provide for rounding up or down to the next whole number, depending on whether the fraction is greater or equal to one half or is less than one half.

In response to comments that inquired about what would happen if an alternative fuel provider grew in size or moved its vehicle operations to one of the MSAs listed in Appendix A to subpart A, the Department has added paragraph (e). Paragraph (e) states that if, in the future, an alternative fuel provider first becomes a covered person subject to the requirements, the fuel provider shall start acquiring alternative fueled vehicles the next model year according to the schedule percentage in effect for that model year. If an alternative fuel provider is newly classified as a covered person in model year 1997, then for model year 1998, 50 percent of the covered person's new light duty motor vehicles must be alternative fueled vehicles. However, DOE expects that some newly classified covered persons will qualify for at least a partial exemption under § 490.308 during the start-up period.

### Section 490.303 Who must comply.

This section tracks section 501(a)(2) of the Act. The criteria for determining which fuel providers are "covered persons" subject to the vehicle acquisition mandate are discussed at the beginning of the discussion of subpart F in this Supplementary Information section.

As stated in the notice of proposed rulemaking, municipal gas and electric utilities possessing the required fleet size, fueling characteristics, and located within the specified geographical areas are classified as covered persons under section 501(a)(2)(B). Therefore, they are expected to comply with the requirements of the mandate under § 490.302; they will not be subject to any future municipal fleet mandate imposed by rule under section 507 of the Act. No public comments critical of this interpretation were received.

The Department received comments seeking clarification regarding the coverage of holding companies and their subsidiaries and affiliates. For the purposes of compliance the Department considers the holding company to be the "covered person" and the individual companies that it owns to be its affiliates. However, once DOE determines that a holding company is a covered person subject to the vehicle acquisition mandate, DOE will permit the holding company to choose to comply with its acquisition requirements either: (1) by assuming sole responsibility for the holding company's compliance; or (2) by choosing to have its affiliates which are substantially engaged in the alternative

fuels business assume the responsibility and report their alternative fueled vehicle acquisitions as separate "covered persons." Holding companies may prefer one option over the other, and DOE does not want to inhibit these holding companies in choosing among options.

Paragraph (b) of § 490.303 describes those covered persons who are excluded by section 501(a)(3)(B) of the Act from having to comply with this subpart. Two categories of covered persons are excluded from the requirements of this regulation: (1) those who transform alternative fuels into a product that is not an alternative fuel; and (2) those who consume alternative fuels as a feedstock or fuel in the manufacture of a product that is not an alternative fuel.

An example of an excluded person described in paragraph (b)(1) would be a manufacturer of windshield washer fluid. The manufacturer would be classified as an excluded person because it blends an alternative fuel, methanol, in producing windshield washer fluid, which is not an alternative fuel. An example of an excluded person described in paragraph (b)(2) would be a company that burns natural gas to provide a heat source for a manufacturing operation. An example of an excluded person under both paragraphs (b)(1) and (b) (2) would be an entity whose principal business is the production of alcoholic beverages.

Section 490.304 Which new light duty motor vehicles are covered.

Under section 501(a)(3)(A) of the Act, if a covered person has more than one affiliate, division, or other business unit, only an affiliate, division, or business unit that is "substantially engaged in the alternative fuels business" is subject to the vehicle acquisition mandate. Section 490.304 reflects the provisions of section 501(a)(3)(A), and should be read in conjunction with the definitions of "affiliate," "division," and "business unit" in § 490.301.

Comments which opposed the application of the acquisition schedule to all new light duty motor vehicles acquired by a covered person are discussed in the analysis of section 490.302.

Section 490.305 Acquisitions satisfying the mandate.

Section 490.305 defines the four categories of alternative fueled vehicle acquisitions that will count toward compliance with section 490.302, including the application of alternative fueled vehicle credits under Subpart F. These categories provide flexibility for organizations in acquiring vehicles to meet this regulation. An alternative fueled light duty motor vehicle shall be considered to be new, regardless of the model year it was manufactured, if:

- (1) The vehicle is an Original Equipment Manufacturer vehicle capable of operating on alternative fuels and was not previously under the control of the covered person; or
- (2) The vehicle is an after-market converted vehicle and was not previously



under the control of the covered person; or

- (3) The vehicle is an Original Equipment Manufacturer vehicle that has been converted to operate on alternative fuels within four months after it comes under the control of the covered person.

A vehicle that meets the description of paragraph (1) is one that is manufactured by an Original Equipment Manufacturer to be capable of operating on alternative fuels. For example, if a covered person acquires a 1994 model year flex-fuel light duty motor vehicle during model year 1997, this vehicle is classified as being a new acquisition for that organization. A vehicle that meets the description of paragraph (2) is one that has been converted to be capable of operating on alternative fuels before it is acquired by a covered person.

DOE received many comments, from both covered persons subject to this subpart and States, on its proposal that an Original Equipment Manufacturer vehicle must be converted prior to its first use in service in order to be counted for compliance. The majority of these commenters felt that this requirement was too burdensome on fleet owners and would result in many vehicles sitting idle while awaiting conversion. The comments also stated that because delivery schedules for both vehicles and conversion equipment are unpredictable, it may be difficult to schedule vehicle conversions to occur when the fleets would require them. Other comments stated that many fleet operators break-in a vehicle for up to 1,000 miles in order to determine whether

the vehicle has reliability problems, and that they would engage in the same break-in period before converting a vehicle to alternative fuel use. It also was stated that some fleet managers take delivery of vehicles before deciding which specific vehicles to convert.

Most of the comments received on this issue recommended a specific time-frame within which the vehicles should be allowed to be converted. The time-frames recommended ranged from 60 days to 2 years. Various reasons were provided in support of the specific time-frames, including that time was needed for conversion equipment to be certified, scheduling and completing vehicle conversion, and vehicle inspection. Various time-frames were attributed to each activity (1 to 2 months for some activities) as well as estimates of the compound effect a possible delay would have on the total time needed to convert a vehicle.

After analyzing all these comments, DOE has determined that a four month time period after vehicle acquisition should provide sufficient time for a fleet to convert a vehicle to operate on alternative fuels. None of the comments contained information showing that four months is not an adequate time period for a general requirement. In addition, the Department's experience with Federal fleet vehicle conversions shows that a four month time period is more than sufficient to allow for the conversion of vehicles. All Federal vehicles that were converted in this program had their conversions completed within a three month time period.

Many commenters requested the Department to allow the conversion of vehicles already in service in fleets to count towards compliance once the rule goes into effect. The notice of proposed rulemaking would not have allowed the conversion of existing vehicles to count and, after analyzing the comments, DOE has concluded that conversion of existing fleet vehicles is not permitted by the Act. Section 501 of the Act specifically refers to "... new light duty motor vehicles acquired by a covered person..." 42 U.S.C. 13254(a). As explained in the discussion of § 490.202 of this Supplementary Information section, the Department has interpreted this section to mean that vehicles, regardless of the date of manufacture, must be newly acquired by the covered person or State in order to count as acquisitions.

A few comments pointed out that the proposed rule did not include any statement about a fleet operator not being required to acquire converted vehicles, as provided in section 507(j) of the Act. The Department has not revised the rule in response to these comments because it sees no need to restate the statutory provision in this final rule.

#### Section 490.306 Vehicle operation requirements.

Section 490.306 tracks section 501(a)(4) of the Act, which requires that all alternative fueled vehicles acquired pursuant to section 501 be operated solely on alternative fuels, except when these vehicles are operating in an area

where alternative fuel is not available. DOE received several comments requesting clarification of whether electric-hybrid vehicles would be considered to be operating solely on alternative fuels. In § 490.2, an electric-hybrid vehicle is defined as "a vehicle primarily powered by an electric motor that draws current from rechargeable storage batteries, fuel cells or other sources of electric current and also relies on a non-electric source of power." DOE also notes that the definition of an electric motor vehicle in section 601 of the Act may include an electric-hybrid vehicle. Thus, by definition, an electric-hybrid vehicle is considered to be an electric vehicle. Many electric-hybrid vehicles are designed with a non-electric power source which operates on an alternative fuel, such as a natural gas turbine or a hydrogen fuel cell. DOE recognizes that some electric-hybrid vehicles may be designed to operate on gasoline or diesel engines, but in almost all cases these engines provide supplementary power to the vehicle, while the electricity generator provides the vast majority of the power to the vehicle's electric drivetrain. Therefore, the use of these vehicles in a covered person's fleet meets the requirement for operating solely on alternative fuels.

The Department also received comments seeking clarification as to whether fuel providers that operate dual-fueled vehicles will comply with this section. Inclusion of dual-fueled vehicles in the definition of "alternative fueled vehicle" in section 301 and the qualifying phrase in section 501(a)(4) of the Act, show that Congress recognized that some fuel providers may operate in areas

where alternative fuels are not available and that if dual-fueled vehicles are used in these territories, they may have to refuel on a petroleum-based fuel. It is clear that, under the Act, the operation of a vehicle on petroleum-based fuel is allowable as long as the dual-fueled vehicle refuels on alternative fuel when it travels in an area where alternative fuel is available.

#### Section 490.307 Option for electric utilities.

Section 490.307 deals with the statutory option available to electric utilities. Paragraph (a) tracks the provisions of section 501(c) of the Act, which provides that a covered person whose principal business is generating, transmitting, importing, or selling, at wholesale or retail, electricity has the option of delaying the alternative fuel vehicle acquisition schedule in section 501(a) of the Act until January 1, 1998, if that covered person intends to comply with this regulation by acquiring electric motor vehicles.

DOE received several inquiries as to whether a combination utility, i.e., a utility that provides both natural gas and electricity, would be allowed to comply as two separate entities, thereby allowing the electric side of the utility to apply for the electric utility option. These comments stated that many combination utilities support both electric vehicle and natural gas vehicle market development and wish to comply with the acquisition requirements by acquiring both kinds of vehicles. The comments stated that the proposed rule appeared

to require combination utilities to choose one type of vehicle only to comply with their acquisition requirements, even though it may be contrary to the strategic plans of that utility.

The Department has decided to allow the electric affiliate, division or business unit of a combination utility to apply for a delay in the implementation of its vehicle acquisition schedule until January 1, 1998. Section 490.307 has been revised to reflect this change by adding the words "or its affiliate, division or business unit" in paragraphs (a)-(c) and by including these words in new paragraph (d). In such circumstances, a schedule delay would be granted to that portion of the utility whose business is the production, generation, distribution or transmission of electricity.

Paragraph (b) contains the acquisition schedule that an electric utility, or its affiliate, division or other business unit must comply with if the Secretary is notified by the required date.

Many commenters argued that if an electric utility, having chosen the electric utility option, is unable despite a good faith effort to acquire suitable or sufficient numbers of electric vehicles to meet its requirements, DOE should grant that utility a full or partial exemption for the applicable model year. These commenters supported a case-by-case exemption process that requires utilities to make a showing of "good faith" efforts to comply. Some commenters stated that it would be appropriate to "roll over" compliance obligations to succeeding model years in certain situations (*e.g.*, the inability of automobile manufacturers

to produce sufficient numbers of electric vehicles.) However, they stated that rolling over requirements would not be appropriate in other situations (*e.g.*, vehicles that meet the normal business requirements of the fleet operator are not available).

DOE has added paragraph (c) to clarify that electric utilities that choose the electric utility option may apply for an exemption under § 490.308 if alternative fueled vehicles or alternative fuels that meet their normal requirements and practices are not available.

Many of the electric utility commenters also urged DOE to categorically provide that an electric utility that chooses to comply with electric vehicles will never be required to purchase another type of alternative fueled vehicle to satisfy the acquisition mandate. They argued that Congress intended that the fuel of choice for covered fuel providers should be the fuel that fuel provider deals in or sells. They stated that inclusion of the electric utility option shows that Congress intended to allow electric utilities to comply with electric vehicles only. They argued that if an electric utility is ultimately unable to meet the acquisition schedule, it would be inequitable and contrary to the Act for DOE to require the utility to acquire some other type of alternative fueled vehicle. Not only would this force electric utilities to create a market for a competitor's fuel, it would require them to divert investment capital away from development of an electric vehicle market.

DOE is generally sympathetic to these arguments, but the utility

commenters did not identify any statutory text or legislative history to support their suggestion for a categorical exemption. Nevertheless, in DOE's view, these arguments may be relevant to requests for exemptions under § 490.308 from the acquisition requirements on the basis that non-electric alternative fueled vehicles do not meet the "normal requirements and practices" of their principal business. If utilities can successfully argue that this is generally true, then DOE is prepared to issue an appropriate interpretive rule.

Comment was received inquiring what would happen to the acquisition schedule of an electric utility, or its affiliate, division or other business unit if it chooses to rescind its election of the electric utility option. In response, DOE has added paragraph (d), which provides that an electric utility, or its affiliate, division or other business unit will have to comply with the acquisition schedule in § 490.302, unless otherwise exempt, if it rescinds its election of the option.

#### Section 490.308 Process for granting exemptions.

Section 490.308 implements the requirements of section 501(a)(5) of the Act, which provides for a simple and reasonable exemption process for those covered persons seeking exemptions either because alternative fuel is not available or alternative fueled vehicles are not reasonably available. Paragraph (a) describes the procedure that a covered person needs to complete to receive an exemption.



Paragraph (b) contains the criteria for exemption, as interpreted by DOE. The first category of exemption is if any covered person demonstrates to the satisfaction of DOE that alternative fuels that meet the normal requirements and practices of the principal business of the covered person's fleet are not available from fueling sites that will allow the fleet to maintain its centrally fueled character in the area where the vehicles are to be operated. The second category of exemption is if any covered person demonstrates to the satisfaction of DOE that alternative fueled vehicles that meet the normal requirements and practices of the principal business of that person are not available for sale or lease on reasonable terms and conditions in any State included in a MSA/CMSA in which the fleet operates.

These exemptions would be granted for one model year only. To receive exemptions for additional model years, alternative fuel providers must reapply to the Department each year. Exemption decisions will be based on documentation that relates to the criteria for determining the availability of alternative fuels and alternative fueled vehicles.

DOE received many comments on the process for obtaining an exemption when either alternative fuels or alternative fueled vehicles that meet the normal requirements and practices of the principal business are not available. Because the statutory criteria for granting exemptions on these grounds are identical for State government fleets and covered persons, DOE consolidates here its summary of the comments of both States and covered fuel

providers.

a. Discussion of alternative fuel availability.

Most of the comments on unavailability of fuel focused on the explanation of § 490.204(a)(1) and § 490.308(a)(1) in the preamble of the notice of proposed rulemaking, rather than on the text of the proposed rule provisions. In the notice of proposed rulemaking, DOE explained the process for determining fuel availability as follows:

[A]n alternative fuel provider must map out the operating area and base of operations for its fleet of vehicles. Next it must locate on the map the alternative fueling facilities within its MSA or CMSA. Then, for each vehicle, it must determine whether any location providing alternative fuel is in the area in which the vehicle is operated. If there is any location providing alternative fuel within the vehicle's operating area, alternative fuel is available. If there are no locations providing alternative fuel, for any alternative fuel that meets the normal requirements and practices of the covered person's principal business, within the vehicle's operating area, then alternative fuel is "not available." 60 F.R. 10980.

Many commenters argued that this explanation of the fuel availability

exemption did not take into account other factors that must be considered in determining fuel availability. For example, commenters argued that alternative fuel should not be considered to be available if --

(1) it is not readily deliverable to motor vehicles because it is not of the proper composition for motor fuel, or there are no dispensers of the fuel;

(2) it is not available at convenient locations and times, or the fueling facility does not provide the same range of services; or

(3) fueling at an alternative fueling facility significantly increases the fueling time.

DOE believes these are factors that are properly considered in determining whether fuel is available that meets "the normal requirements and practices" of the principal business of the covered person or fleet. DOE will consider factors such as these when determining whether to grant or deny a request for an exemption because alternative fuel is not available.

DOE will, to the extent consistent with its statutory responsibilities, defer to reasonable fleet operators' judgments about the alternative fueled vehicles and alternative fuels that best meet their needs. DOE offers the following example to illustrate this:

A State government fleet operator reasonably determines that vans are the only available vehicles that meet its normal business requirements and practices. In searching for alternative fueled vans, the State fleet

operator determines that only CNG-powered vans are available, but CNG is not available in the fleet's operating area. However, ethanol fueling facilities are available in the fleet's operating area. Because the State fleet operator has determined that no ethanol vans are available, it can apply for an exemption. DOE is likely to grant an exemption under paragraph (b)(1) for this situation.

Numerous commenters, including many electric utilities, stated that the proposed exemption requirements would force them to operate alternative fueled vehicles in rural areas that lack the refueling infrastructure or are otherwise unsuited to alternative fueled vehicle use because of terrain, climate, and other factors. Some commenters argued that an alternative fuel site located near the far edge of a vehicle's operating range is not a suitable refueling location for the fleet. Several commenters stated that the requirement of mapping operating areas and fueling sites is burdensome and impractical. One commenter argued that if an alternative fuel facility is not available that allows the fleet to maintain its centrally fueled characteristics, an exemption should be granted. Other commenters recommended that DOE revise the rule to specify a distance in miles, beyond which alternative fuel would be deemed "unavailable."

In response to these comments, DOE has revised § 490.308 to state, in paragraph (b)(1), that alternative fuel is not available if it cannot be obtained from fueling sites that permit central fueling of the covered person's fleet.

Paragraph (c)(2) provides that a covered person that operates light duty vehicles outside of the MSAs/CMSAs listed in Appendix A of Subpart A is not required to map the vehicle operation zones and alternative fuel site locations if it can otherwise show that central fueling does not meet the normal requirements and practices of its principal business.

DOE notes that some of the comments which criticized the proposed exemption provision reflect a misunderstanding of § 490.306, which incorporates the Act's requirement that alternative fueled vehicles owned or controlled by covered persons must operate solely on alternative fuels. As explained in the discussion of § 490.306, that requirement does not apply when vehicles are operating in areas where the appropriate alternative fuel is not available.

b. Discussion of alternative fueled vehicle availability.

To receive an exemption based on the criteria in subparagraph (b)(2), the covered person (or State fleet operator under § 490.204) must show that alternative fueled vehicles that meet the normal practices and requirements of its principal business are not available for commercial acquisition on reasonable terms and conditions for each MSA/CMSA that they operate a fleet in, within any of the States a MSA/CMSA comprises. For example, a covered person operating a fleet in the Louisville MSA (KY-IN) would have to show that no alternative fueled vehicle that meets the needs of its fleet are available in

Kentucky or Indiana on reasonable terms and conditions.

Covered fuel providers having vehicles outside of MSAs/CMSAs, which are centrally fueled or capable of central fueling, must show that alternative fueled vehicles that meet the normal requirements and practices of their principal business are not commercially available on reasonable terms within the States those vehicles operate in.

Many commenters asked for clarification of the factors that DOE will take into account when determining whether vehicles are commercially available on reasonable terms and conditions. Some commenters pointed out that fleets procure vehicles in regular cycles, and in the case of States, sometimes multi-year cycles. In addition, the availability of alternative fueled vehicles produced by automobile manufacturers is limited, and delivery dates are sometimes uncertain. As a result, States and covered persons claim they may be unable to acquire alternative fueled vehicles during the model year in which they are required, even if they have acted in good faith and taken reasonable steps to meet their requirements. Many electric utilities submitted comments expressing concern about the consequences of being unable, despite a good faith effort, to obtain electric vehicles to satisfy their requirements. *See* discussion of § 490.307.

DOE will examine each request, and supporting documentation, to determine whether the State fleet or covered person has acted in good faith and taken reasonable steps to acquire vehicles for the model year in question.

DOE will take into account the terms and conditions of any contracts or agreements a State fleet or covered person has entered into to obtain alternative fueled vehicles, as well as purchase orders placed by States and covered persons. For this determination, terms and conditions refer to stipulations, provisions, limitations, and prerequisites that are included in the contracts or agreements that enable the covered person to acquire motor vehicles.

If a fleet operator has ordered alternative fueled vehicles during a model year with a reasonable expectation that they would be delivered by the end of the model year, DOE will grant an exemption for that model year if the vehicles are not delivered in time to satisfy the requirement. Those vehicles would not then count as acquisitions in the model year in which they were delivered. On the other hand, DOE may not grant an exemption if it determines that a fleet or covered person has not made a good faith effort to acquire alternative fueled vehicles for a model year.

In the case of fuel providers, including utilities choosing the electric utility option under § 490.307, DOE will take into account steps the covered person has taken to help develop a market for alternative fueled vehicles that use the fuel that they provide.

Some commenters stated that requiring a State or covered person to inquire about alternative fueled vehicle availability from every dealer in a State is onerous. These commenters stated that the paperwork burden and the time

involved in this process would be excessive. The Department does not wish to impose an undue paperwork burden on those States and fuel providers that are required to acquire alternative fueled vehicles under this program. To lessen the burden, DOE will only require a State or fuel provider to submit documentation from Original Equipment Manufacturers showing that alternative fueled vehicles meeting its normal requirement and practices will not be available directly or through any dealer in a particular State. Returning to the above example of a covered person operating a fleet in the Louisville MSA, the covered person needs to provide documentation that shows that Original Equipment Manufacturers will not provide alternative fueled vehicles that meet its normal requirements and practices either directly or through a dealer in Kentucky or Indiana. Thus, the final rule only requires a covered person to submit documentation from a limited number of sources showing vehicle unavailability, as opposed to documentation from every dealer in a State. The Department believes that this will greatly simplify the process for States and covered persons in determining the availability of alternative fueled vehicles that meet their normal requirements and practices.

DOE has added paragraph (e) to clarify that an exemption may be granted in whole or in part. One situation in which a partial waiver (e.g., exempting a fleet from model year requirements, but requiring some or all of the vehicles to be acquired in the next model year) may be appropriate is when a fleet or covered person cannot acquire vehicles in time to satisfy a model



year's requirements.

Some commenters sought clarification or offered recommendations concerning the meaning of "normal requirements and practices" when used in determining whether alternative fueled vehicles are available. Several commenters argued that the range, safety, performance characteristics, maintainability, cost, cargo capacity and passenger capacity should be factors included in making that determination. One commenter stated, for example, that a utility which normally purchases subcompact cars for reading meters should not be required to purchase luxury class vehicles if subcompacts are not available. DOE agrees that all of these factors may be considered in determining whether alternative fueled vehicles are available that meet the normal requirements and practices of a State fleet's or covered person's business.

If a covered person normally acquires vehicles from one automobile dealer or from one automobile manufacturer, but is unable to acquire alternative fueled vehicles of the model type needed from these same sources, this is not sufficient to qualify for an exemption under subparagraph (b)(2), if appropriate alternative fueled vehicles are available from other dealers or manufacturers. Having to use another dealer or manufacturer will not be considered to be outside the normal requirements and practices of the covered person. The same procedures that are currently being employed by the covered person to obtain these vehicles can be used to obtain them from different sources.

Paragraph (b) sets forth the types of documentation in support of exemption requests that should be provided to DOE.

#### Section 490.309 Annual reporting requirements.

Section 490.309 sets forth annual reporting requirements. An annual report to verify regulation compliance is required of all covered alternative fuel providers. Paragraph (a) sets forth where and by when annual reports should be sent.

Paragraph (b) describes the information that must be included in this annual report. One commenter suggested that DOE should require States and fuel providers to report whether a vehicle is dedicated or dual-fueled and the type of fuel the vehicle is capable of operating on. The Department has determined that this information is necessary for administering title V of the Act, including monitoring compliance with the vehicle acquisition requirements. Thus, section 490.309(b)(5)(iv) and (v) have been added.

Subparagraph (b)(2) requires covered persons to report the number of new light duty alternative fueled vehicles that they are required to acquire by section 490.302 or 490.307. To determine this number, a covered person would multiply the number entered for subparagraph (b)(1), by the acquisition percentage from section 490.302 or 490.307, whichever applies for that model year. For example, if the number of new light duty motor vehicles acquired by

a covered person in MY 1998 is 50, the number of new light duty vehicles that are required to be acquired is 50 percent of 50, or 25 ( $50 \times .5 = 25$ ). The number of new light duty alternative fueled vehicles acquired, added to the number of alternative fueled vehicle credits applied, from subparagraph (b)(4), should be equal to or greater than the number calculated for subparagraph (b)(2).

Paragraph (c) sets forth the procedure that a covered person must follow if it is applying alternative fueled vehicle credits against its acquisition requirements.

Consistent with the requirements of 5 CFR Part 1320.6(f), paragraph (d) would require that records related to this reporting requirement be maintained and retained for a period of three years.

#### **E. Subpart E -- Reserved**

#### **F. Subpart F -- Alternative Fueled Vehicle Credit Program**

##### **Background**

Section 508 of the Act requires DOE to establish an alternative fueled vehicle credit program that will allocate alternative fueled vehicle credits to a fleet or covered person that is required to acquire alternative fueled vehicles under title V of the Act. Credits are to be given to a fleet or covered person that acquires alternative fueled vehicles in excess of the number that fleet or covered person is required to acquire, or that acquires alternative fueled

vehicles prior to the date that fleet or covered person is required to acquire alternative fueled vehicles. An alternative fueled vehicle credit may be used to comply with alternative fuel provider or fleet program requirements in a later year, or it may be traded to another fleet or covered person who is required to acquire alternative fueled vehicles by Part 490.

The purpose of establishing a credit program is to provide purchasing flexibility for the regulated fleet operators without sacrificing the program's energy security goals. The general concept is that some fleet operators may, at times, find it attractive to buy more alternative fueled vehicles than required, if in doing so they can get credit against future acquisition requirements, or can sell or transfer the credits to another party. If the credit program is properly implemented and managed, there will be no decrease in energy security compared to a program based strictly on compliance through acquisitions.

Subject to a restriction on fuel use that must accompany a credit transferred to a covered fuel provider, alternative fueled vehicle credits can be traded freely among any of the organizations in the United States that are required to acquire alternative fueled vehicles. Because a major goal of the Act is the reduction of our Nation's dependency on foreign oil, it makes little difference where in the United States this reduction takes place. This distinguishes the DOE credit program from credit trading under EPA's Clean Fuel Vehicle program, which limits trading to transfers within the "non-attainment" areas.

The one restriction on trading is based upon the last sentence of section 508(d) of the Act, which provides that vehicles generating credits which are transferred to alternative fuel providers must operate solely on alternative fuel, except when operating in an area where the appropriate alternative fuel is unavailable. 42 U.S.C. 13258(d). This requirement is explained in the discussion of § 490.506 in this Supplementary Information.

#### Section 490.502 Creditable Actions.

Section 490.502 describes the actions for which DOE will allocate alternative fueled vehicle credits pursuant to section 508 of the Act. Section 508(a) of the Act authorizes the allocation of credits to fleets or covered persons that acquire alternative fueled vehicles in excess of the number they are required to acquire, or that acquire alternative fueled vehicles in advance of the date they are required to be acquired. However, after the Act's alternative fueled vehicle acquisition requirements become effective under this part, the only way a fleet or covered person can generate credits is by acquiring alternative fueled vehicles exceeding the number of vehicles required to be acquired, calculated as applicable under § 490.201 or § 490.302. Credits can no longer be allocated for early acquisitions. For example, an alternative fueled vehicle acquired in excess of the number required in model year 1997 cannot be claimed to be an early acquired alternative fueled vehicle for model year

1999. The excess alternative fueled vehicle will generate 1 alternative fueled vehicle credit only, **not** 2 credits because it was acquired 2 years in advance.

Under this provision, the acquisition of alternative fueled vehicles excluded from acquisition determinations by § 490.3, such as motor vehicles held for lease or rental to the general public, emergency vehicles and law enforcement vehicles, will generate credits that can be used to satisfy the State fleet and alternative fuel provider acquisition requirements. Similarly, acquisition of alternative fueled vehicles exceeding 8,500 pounds gross vehicle weight (i.e., medium and heavy duty vehicles) also will generate credits. Section 508(b) of the Act provides the statutory basis for this policy because it refers to the allocation of credits for the excess or early acquisition of alternative fueled vehicles in excess of the number of vehicles a fleet or covered person is required to acquire. Credits are not limited to alternative fueled vehicles that qualify as acquisitions under the vehicle acquisition mandates for States and fuel providers.

The allowance of credits for the acquisition of medium and heavy duty alternative fueled vehicles reflects a change from the notice of proposed rulemaking. In the notice of proposed rulemaking, DOE discussed whether to allow the acquisition of medium duty and heavy duty alternative fueled vehicles to generate credits. DOE stated that many medium duty and heavy duty vehicles are predominantly urban use vehicles, such as transit buses and delivery trucks, and could take advantage of the anticipated fueling

infrastructure within these urban areas. DOE also stated that these vehicles possess larger capacity engines, which consume significantly more fuel than light duty vehicles and result in increased displacement of petroleum-based fuel and greater energy security. However, while recognizing these potential benefits from giving credit for such acquisitions, DOE stated that the Act prevented allocating credits for the acquisition of medium and heavy duty vehicles because section 508(b) provides that a credit shall be allocated for the same "type" vehicle as the excess vehicle or earlier acquired vehicle. The term "type" is not defined in the Act, and nothing in the legislative history of the Act explains it. In the notice, DOE proposed the interpretation that because the only type of vehicles that are required to be acquired by title V are light duty vehicles, credits could not be given for the acquisition of medium and heavy duty alternative fueled vehicles. See 60 F.R. at 10982.

a. Comments critical of the Department's proposed interpretation.

The Department's proposed interpretation of section 508(b) of the Act, as applied to allocating credits for the acquisition of medium and heavy duty vehicles, was the subject of much criticism in public comments. Commenters argued that the proposed interpretation was not required by the text of the Act, and that other interpretations would better further the goals of the Act.

Several commenters pointed out that "alternative fueled vehicle," as defined in section 301(3) of the Act, is not limited to motor vehicles weighing 8,500 or fewer pounds gross vehicle weight. Commenters also stated that the

term "class," not "type," is commonly used to distinguish vehicles by weight. Therefore, if Congress had intended to restrict credits to acquisition of light duty vehicles, it would not have used the term "type" to impose such a restriction. In support of this argument, commenters noted that the term "type" is used in section 302(a) of the Act to distinguish dedicated and dual fueled vehicles. Some commenters argued that the statutory language would have been a peculiarly indirect way for Congress to limit allocation of credits to acquisition of light duty vehicles. Congress could have provided that credits shall only be allocated for the acquisition of light duty alternative fueled vehicles. Or, as one commenter pointed out, Congress could simply have stated that DOE shall only allocate credits for early or excess acquisitions. Instead, section 508(b) states that "credits shall be allocated for the same type vehicle as the excess vehicle or earlier acquired vehicle."

Commenters also argued that although Congress decided not to require the acquisition of medium and heavy duty vehicles as part of the mandates, the concerns that influenced that decision are not present when a State or covered person voluntarily acquires an alternative fueled medium or heavy duty vehicle. Engine manufacturers stated that medium and heavy duty vehicles were exempted from the Act's alternative fueled vehicle acquisition requirements because most heavy duty engines are not capable of operating on flexible fueling, and the alternative fueling infrastructure is not developed widely enough to meet the needs of such dedicated fuel vehicles. Another commenter



suggested that the study of heavy duty vehicles acquired by Federal government fleets, mandated by section 302(a)(4) of the Act, indicates that Congress favored including heavy duty vehicles but thought that more information was needed before requiring States and covered persons to acquire heavy duty vehicles. Thus, in their view, there is no inconsistency in limiting the acquisition mandates to light duty vehicles and allocating credits for the voluntary acquisition of medium and heavy duty vehicles.

Commenters also argued that interpreting the term "type" to foreclose allocation of credits to acquisition of medium and heavy duty vehicles would be contrary to the Act's petroleum displacement and air quality goals.

Commenters supplied additional information and reasons to show that allocating credits for the acquisition of medium and heavy duty vehicles will promote the goals of the Act. These commenters stated that allowing credit for the acquisition of medium and heavy duty alternative fueled vehicles will increase the availability of alternative fueled vehicles, allow fleets increased flexibility in acquiring vehicles, and advance the state of alternative fueled vehicle technology. The California Energy Commission commented that its extensive experience in alternative fuel infrastructure development shows that it is critical to have a high volume of alternative fuel available immediately to achieve the economies of scale needed for alternative fuels to compete with conventional fuels. Another commenter stated that high alternative fuel usage is needed to permit fleets to offset the higher initial cost of alternative fueled vehicles. It was

argued that allowing credits for the acquisition of medium and heavy duty vehicles, which use much more fuel than light duty vehicles, will promote development of the fueling infrastructure that is essential for covered persons and fleets. Other commenters stated that the use of alternative fuels in medium and heavy duty vehicles will contribute to the air quality goals in section 502 of the Act because heavy duty vehicles emit high levels of pollution when operating on petroleum-based fuels.

b. Response to comments and explanation of the final rule.

DOE agrees with the commenters who argued that interpreting the word "type" to restrict allocation of credits to acquisition of light duty vehicles produces a result that does less to further the Act's petroleum displacement and other goals than would allowing credits for the acquisition of medium and heavy duty vehicles. DOE also is persuaded that allocating credits for medium and heavy duty vehicle acquisitions would not be inconsistent with Congress' decision to exclude medium and heavy duty vehicles from the alternative fueled vehicle acquisition mandates.

However, DOE is obligated to give effect to the statutory text, and section 508(b) states that a "credit shall be allocated for the same type vehicle as the excess or earlier acquired vehicle." Although commenters suggested various alternative interpretations of this statutory language, DOE has concluded that none of the commenters' proposed interpretations is satisfactory. Some commenters suggested that "type" could refer to the Act's requirement

that covered alternative fuel providers must operate vehicles solely on alternative fuel, except when operating in areas where such fuel is not available. They suggested that DOE could interpret the type of vehicle restriction to require that a vehicle which generated a credit must be operated solely on alternative fuel after the credit's transfer. This interpretation is unsatisfactory because section 508(d) already expressly attaches the alternative fuel operation requirement to credits generated by fuel provider acquisitions. Other commenters suggested that "type" could refer to the type of alternative fuel used by the vehicle. However, this distinction makes no sense in the context of the State and alternative fuel provider mandates because sections 501 and 507(o) are "fuel neutral," i.e., they contain no distinctions based on type of alternative fuels. Some commenters argued that the type of vehicle restriction could be interpreted to permit allocating more credits for alternative fueled vehicles that consume a large amount of alternative fuel. However, section 508(b) expressly provides that one credit shall be allocated for the acquisition of alternative fueled vehicles; thus, multiple credits for vehicles that consume a large amount of alternative fuel is not permitted.

The statutory text allows one plausible interpretation of the type of vehicle restriction, which could be applied to address a situation that might arise under title V of the Act. Unlike sections 501 and 507(o) of the Act, which set forth light duty vehicle acquisition requirements for States and covered fuel providers, section 507(k)(2) of the Act authorizes DOE, by rule, to require

inclusion of new urban buses in a private or municipal fleet vehicle acquisition program established under section established under section 507(a) or (g). The type of vehicle restriction in section 508 could apply to prevent a covered private or municipal fleet operator from satisfying a requirement to acquire an urban bus with a credit that was generated by the acquisition of a light duty vehicle. The allocation of a credit for the acquisition of a light duty vehicle in that situation would undermine the petroleum displacement and air quality goals of the Act. If DOE proposes a private and municipal fleet program in the future, DOE may propose amendments to subpart F in order to reflect the "type" of vehicle restriction. Experience under the Alternative Fuel Transportation Program may reveal other possible applications of the type of vehicle restriction in section 508(b). In that event, DOE will give effect to this language through case-by-case application of the statutory provision or by proposing an amendment of these regulations.

In summary, it is not clear what Congress intended by including the type of vehicle restriction in section 508. However, after reconsidering this issue, DOE has concluded that whatever that statutory language means, it cannot be interpreted to mean that credits may not be allocated for the acquisition of medium and heavy duty vehicles under this part. Therefore, §490.502 has been revised to treat the acquisition of new medium and heavy duty vehicles the same as vehicles excluded under the section 490.3 Both involve the acquisition of an alternative fueled vehicle in addition to the number of

alternative fueled vehicles that a fleet is required to acquire. Thus, both should generate credit.

The Department received comments requesting that credits be allocated for conversions of fleet vehicles to alternative fueled vehicles before the effective date of the acquisition requirements. These commenters argued that they had been converting vehicles since 1992, believing that they would receive credits for these conversions pursuant to section 508 of the Act.

DOE can accommodate these comments to a limited extent because its discretion to allocate credits for conversions that occur prior to the effective date of the acquisition requirements is limited by the terms of the Act. Section 508(a) provides, in relevant part, that DOE shall allocate a credit to a fleet or covered person that "acquires an alternative fueled vehicle . . . before the date that fleet or covered person is required to acquire an alternative fueled vehicle under [title V]." 42 U.S.C. 13258(a). It is clear from this statutory text that an alternative fueled vehicle must be acquired by a fleet or covered person subject to the Act's acquisition requirements in order for a credit to be allocated for that vehicle. The conversion of a vehicle already in service in a fleet on October 24, 1992, the effective date of the Act, would not satisfy this acquisition requirement. In addition, there is no statutory provision authorizing DOE to allocate credits for the acquisition of alternative fueled vehicles prior to the effective date of the Act.

Thus, DOE will allocate credits to a State fleet or covered person subject

to the acquisition requirements only if it purchased or leased a motor vehicle on or after October 24, 1992, and converted it to an alternative fueled vehicle before the effective date of the applicable acquisition requirements. For purposes of calculating credits for early acquisition of these vehicles, DOE will consider the date of the conversion to be the acquisition date. Paragraph (c) of §490.502 has been added to make clear that the four-month time limit on conversions, established by §490.202(a)(3) and §490.305(a)(3) of this rule, shall not be applied retroactively to any conversion that occurred before the date this rule takes effect.

Some commenters recommended that DOE should award credits based on the amount of petroleum displaced, rather than for the early or excess acquisition of an alternative fueled vehicle. These commenters argued that awarding credits based on the amount of petroleum displaced will encourage the use of more alternative fuel than the current proposal. Again, section 508 of the Act does not allow DOE to adopt this recommendation. Section 508 states that credits shall be awarded for the acquisition of alternative fueled vehicles by fleets and covered persons that are required to acquire alternative fueled vehicles. By implication, therefore, DOE may not award credits based on the amount of petroleum displaced.

Several commenters requested that DOE award credits to fleets not currently subject to acquisition mandates, such as fuel provider, private, municipal and State agency fleets that, although not required to obtain vehicles,

voluntarily have chosen to acquire alternative fueled vehicles. These commenters argue that awarding credits to these fleets would increase acquisitions of alternative fueled vehicles, which will boost petroleum displacement and aid in the development of a market for alternative fuels and alternative fueled vehicles. The Department agrees that the voluntary acquisition of alternative fueled vehicles by these fleets would result in increased petroleum displacement and bolster the alternative fuels market. However, section 508(a) states unambiguously that "the Secretary shall allocate a credit to a fleet or covered person that is required to acquire an alternative fueled vehicle..." 42 U.S.C. 13258(a) (emphasis added). Thus, a fleet or covered person must be required by the Act to acquire alternative fueled vehicles before credits can be allocated to them. Non-mandated fleets are not eligible to earn credits.

#### Section 490.503 Credit allocation.

Section 490.503 deals with alternative fueled vehicle credit allocation. Paragraphs (a) and (b) are consistent with the language of section 508(a) of the Act, which describes how credits are to be allocated. Before alternative fueled vehicle credits are allocated a covered person or fleet must apply for them using the procedure described in § 490.507.

Paragraph (a) provides for the allocation of one credit for each

alternative fueled vehicle a fleet or covered person acquires that exceeds the number of light duty alternative fueled vehicles that fleet or person is required to acquire. Thus, if a fleet or covered person is required to acquire 10 light duty alternative fueled vehicles in a model year and it acquires 15 alternative fueled vehicles, it can apply for allocation of five alternative fueled vehicle credits.

Paragraph (b) provides for the allocation of one credit for each year an alternative fueled vehicle is acquired in advance of the date the fleet or covered person is required to acquire alternative fueled vehicles. For State fleets and covered persons, excluding States that elect to submit an alternative plan under § 490.203 and those covered persons that choose the electric utility option provided by § 490.307, the requirements shall take effect on September 1, 1996, the beginning of MY 1997. States that comply through alternative plans approved by DOE may be exempt from MY 1997 requirements, in which case the acquisition requirements will take effect for them on September 1, 1997, the beginning of MY 1998. For those covered persons that have taken the electric utility option provided by § 490.307, the effective date is January 1, 1998. Credits will be awarded for the acquisition of light, medium, and heavy duty alternative fueled vehicles, and for alternative fueled vehicles excluded by § 490.3, prior to these dates.

Private and municipal fleets are not required by this rule to acquire alternative fueled vehicles. If DOE later establishes a private and municipal fleet program through rulemaking under section 507(b) or (g) of the Act, all



alternative fueled motor vehicles newly acquired between October 24, 1992 and the start date of the private and local fleet mandate would be eligible for credit allocation at the rate of one credit for each year an alternative fueled vehicle is acquired in advance of the effective dates of those mandates.

Several commenters suggested that dedicated vehicles should receive double the credits of dual-fuel or flexible-fuel vehicles. DOE does not have the statutory authority to allocate credits in this manner. Section 508(b) of the Act provides for the allocation of credits for "alternative fueled vehicles" acquired by fleets and covered persons subject to the Act's requirements, and it does not differentiate between dedicated and dual-fuel vehicles. This is consistent with the definition of "alternative fueled vehicle" in section 301(3), which includes both dedicated and dual-fuel vehicles.

Credit allocation is best explained by the following examples.

Example 1. A covered person acquires 10 alternative fueled vehicles in MY 1994 and 15 alternative fueled vehicles in MY 1995. The covered person acquires no alternative fueled vehicles in MY 1996. Because the covered person is not required to acquire alternative fueled vehicles until MY 1997, each alternative fueled vehicle acquired in MY 1994 will generate 3 credits and each alternative fueled vehicle acquired in MY 1995 will generate 2 credits. Thus, the covered person generates 60 credits  $[(10 \times 3) + (15 \times 2) = 60]$ , which can be used against that

person's future alternative fueled vehicle acquisition requirements or can be traded to other covered persons or fleets.

Example 2. An electric utility that has chosen the option provided by § 490.507 acquires 10 electric vehicles in each of calendar years 1993 through 1997. Since the electric utility is not required to acquire alternative fueled vehicles until January 1, 1998, credits are generated on a calendar year basis for the early acquisition of alternative fueled vehicles. Thus each electric vehicle acquired in calendar year 1993 will earn 5 credits because it was acquired 5 years early. Similar logic ensues for acquisitions in subsequent years. Thus, the electric utility generates 150 credits  $[(10 \times 5) + (10 \times 4) + (10 \times 3) + (10 \times 2) + (10 \times 1)] = 150$  for the acquisition of 50 electric vehicles from 1993 to 1997. These credits can be used against the utility's future alternative fueled vehicle acquisition requirements or can be traded.

Example 3. A State fleet acquires 20 alternative fueled vehicles in model years 1995 and 1996. Thus, the State has earned 60 credits prior to the start of the program  $[(20 \times 2) + (20 \times 1)] = 60$ . The State fleet also plans to acquire 20 alternative fueled vehicles in model years 1997 and 1998. The State fleet regularly acquires 100 new light duty vehicles each year. For model years 1997 and 1998 the State fleet's acquisition requirements

are 10 and 15 alternative fueled vehicles, respectively. If the State actually acquires 20 alternative fueled vehicles in model years 1997 and 1998, it will have acquired 10 vehicles in excess of its requirement for model year 1997 and 5 vehicles in excess of its requirement for model year 1998. These excess acquisitions would earn the State fleet 10 and 5 credits, respectively. Thus, the State fleet has earned credits for both early and excess acquisitions of alternative fueled vehicles. The total number of credits the State fleet will have earned for model years 1995 through 1998 is  $75 (60 + 10 + 5) = 75$ . These credits can be used against the State fleet's future alternative fueled vehicle acquisition requirements or can be traded.

DOE will establish a computer database that will serve as a record of credit allocations, trades and credit balances.

#### Section 490.504 Use of alternative fueled vehicle credits.

No comments specifically critical of this section were received. However, the Office of Management and Budget requested that § 490.504 be revised to clarify that one credit represents the acquisition of one alternative fueled vehicle in a model year for which a fleet or covered person is required to acquire alternative fueled vehicles. Each alternative fueled vehicle credit will represent

one alternative fueled vehicle and can be applied against the alternative fueled vehicle acquisition requirements for one model year only, as designated by the fleet or covered person. Section 490.504 has been revised accordingly.

#### Section 490.505 Credit accounts.

Section 490.505 deals with Alternative Fueled Vehicle Credit accounts. Paragraph (a) states that DOE will establish a credit account for each fleet or covered person who obtains an alternative fueled vehicle credit. Paragraph (b) states that each fleet or covered person will receive an annual credit account balance statement after the receipt and recording of its annual activity report.

In the proposed rule, DOE indicated that it was considering providing updated credit account balance statements to fleets and covered persons upon request during the year. These updated credit account balance statements would constitute proof of a fleet or covered person's credit account balance as of the date they were printed. These statements may be required of a credit seller by a credit purchaser before proceeding with the credit transfer. DOE asked for comment on whether credit account balance statements should be provided for a charge. Several comments were received on this issue, all opposing a fee for these statements. DOE has decided to provide these statements at no cost to the requestor, but it may in the future decide to limit the number of reports that will be provided free of charge. DOE will provide notice, by publication in the Federal Register, and directly to affected State

fleets and covered persons, if it later finds that it is necessary to limit the number of statements that it will provide free of charge.

#### Section 490.506 Alternative Fuel Vehicle credit transfers.

No comments specifically critical of this section were received. Section 490.506 deals with the transfer of alternative fueled vehicle credits. Paragraph (a) states that any fleet or covered person may transfer an alternative fueled vehicle credit to any fleet required to acquire alternative fueled vehicles, or to a covered person if the transferor certifies to the covered person that the vehicle which generated the credit will operate solely on alternative fuel, except when the vehicle is operated in an area where the appropriate alternative fuel is unavailable. This restriction on the transfer of credits to a covered person is required by section 508(d) of the Act. 42 U.S.C. 13258(d).

Paragraph (b) states that proof of credit transfer should be provided to DOE within thirty days of the transfer date, and provides for the use of a DOE form, or other written documentation containing the dated signatures of the transferor and transferee. This is a change from a proposed requirement to report credit transfers within seven days. Seven days was criticized as being insufficient time by commenters.

#### Section 490.507 Credit activity reporting requirements.

Section 490.507 describes the credit program's activity reporting requirements. An annual report is required of all fleets or covered persons who have generated or traded alternative fueled vehicle credits to record and track their credit activity. One commenter urged DOE to drop the reporting requirement, and only require the retention of credit activity records. DOE has not adopted this recommendation because the credit reports are essential for monitoring compliance with the vehicle acquisition requirements. Reporting will also aid the development of an alternative fueled vehicle credit market.

Paragraph (a) sets forth where and by when annual reports should be sent. Paragraph (b) describes the required information that would be included in this annual report. Subparagraph (b)(1) allows a fleet or covered person to report either the number of alternative fueled vehicles acquired in excess of acquisition requirements for the model year or the number of alternative fueled vehicles acquired in advance of the start date of the acquisition requirements. Except for covered persons that choose that electric utility option or States that elect to submit an alternative compliance plan, States and covered persons subject section 501 of the Act can no longer earn credits for early acquisition of alternative fueled vehicles after September 1, 1996, the beginning of model year 1997.

## **G. Subpart G -- Investigations and Enforcement**

This subpart elicited few public comments. The only specific

recommendation received was a request that DOE add a provision that would give States 90 days advance notice of its intent to bring an action to enforce compliance with the Act's alternative fueled vehicle acquisition requirements. DOE agrees that such advance notice would generally be desirable for both States and covered persons. However, there may be some situations where it would not be appropriate, such as the repeated, willful refusal to comply with the acquisition requirements. Thus, DOE has added a sentence to § 490.605, Statement of Enforcement Policy, which states that DOE normally will not commence an enforcement action against a person subject to the acquisition requirements without giving that person notice of its intent 90 days before the beginning of an enforcement proceeding.

#### **IV. Review Under Executive Order 12612**

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effect on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of government. If there are substantial effects, then the Executive Order requires a preparation of a Federalism assessment to be used in all decisions involved in promulgating and implementing policy action.

This rule implements the alternative fueled vehicle acquisition requirements in section 507(o) of the Act, which apply to State government

fleets. It also establishes an Alternative Fueled Vehicle Credit Program under which States may generate credits if they obtain alternative fueled vehicles in excess of their required quantity or if they obtain alternative fueled vehicles prior to the date when they are required to acquire alternative fueled vehicles. The allocation of credits is based on the measurable actions of obtaining alternative fueled vehicles and is available to fleets, that meet the requirements, throughout the United States.

The granting of credits to States will be handled in the same manner as the granting of credits to any other covered fleet operator. The enforcement of the State fleet mandate will be handled in the same manner as other mandate programs. States can also apply for a hardship exemption which would exempt them from acquiring alternative fueled vehicles in any given year.

The Department has determined that since States are treated the same as any other fleet operator in the allocation of credits and in the administration and enforcement of the fleet mandate, the final rule will not have a substantial direct effect on the institutional interests or traditional functions of States. In addition, the provision for hardship exemptions included in the State fleet mandate precludes any impermissible expansion of the authority that the Federal government has over States.

Section X of this Supplementary Information addresses the potential costs to States of this final rule.



## **V. Review Under Executive Order 12778**

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation by providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. DOE certifies that this rule meets the requirements of sections 2(a) and (b)(2) of Executive Order 12778.

## **VI. Review Under Executive Order 12866**

Today's regulatory action was subject to review under Executive Order 12866, Regulatory Planning and Review (October 4, 1993) by the Office of Information and Regulatory Affairs (OIRA). Although DOE concluded that the final rule would not result in (1) an annual effect on the economy of \$100 million or more or (2) have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete in domestic export markets, OIRA nevertheless determined this rulemaking to be a significant regulatory action under the Executive Order and requested that DOE prepare a cost analysis. A copy of

that cost analysis is in the administrative record on file in DOE's Freedom of Information Reading Room.

The cost analysis that was performed for the proposed rule spans, the 25-year time frame from 1995 to 2020 , and it includes the incremental vehicle purchase cost and the cost differential between alternative fuels and gasoline under five different scenarios. The analysis examines the effects the rule will have on the acquisition of alternative fueled vehicles by fuel providers and State fleets, exclusive of the effects of non-mandated acquisition of vehicles by these and other fleets. In doing so it assumes that no alternative fueled vehicles will be acquired by these fleets prior to model year 1996. In actuality, these fleets currently are acquiring alternative fueled vehicles - either because of economics, State laws or business strategies - and will probably continue to do so in the future. Assumptions about the number of vehicles acquired, the operating characteristics of those vehicles, fleet vehicle replacement rates, current and future alternative fueled vehicle incremental costs, and current and future retail fuel costs were based on previous analyses undertaken by the Department. The analysis did not include estimates of the effects of any Federal and State tax incentives for the acquisition of alternative fueled vehicles.

The cost analysis of the proposed rule shows that the costs to fuel providers and State fleets in complying with the rule varies depending upon vehicle type, fuel type and fuel consumption, but in no case would the

estimated annual costs exceed \$61 million per year. More typically, under the various scenarios, the estimated annual costs are approximately \$25 million, decreasing to \$10 million per year in later years.

The Department sought comments on all aspects of its analysis. In particular, the Department requested comment on the following elements of the analysis: the retail and net-of-excise-tax future price projections for gasoline and alternative fuels; the assumption that alternative fueled vehicle purchases, that would result in apparent life-cycle cost savings, would not occur in the absence of this rule; and the assumption that the cost per gallon of gasoline displaced falls as the amount of gasoline displaced increases and data that would aid in estimating the extra refueling costs for covered persons whose fleets use fuels other than the one they themselves provide.

Several comments were received on the Department's cost analysis. The comments were centered on the estimated fuel and vehicle costs that were included in the analysis. Commenters claimed that the estimated prices for gasoline were high while the estimated prices for alternative fuel were low. These commenters also stated that the incremental alternative fueled vehicle prices included in the cost analysis were low. Another commenter stated that the projected cost of gasoline was understated in DOE's cost analysis because it did not include energy security and environmental costs. A few commenters stated that DOE did not consider the additional costs of operating alternative fueled vehicles, such as the time and labor required for travel to refueling sites

and the extra cost of more frequent refueling.

One commenter submitted an especially detailed critique of the Department's cost analysis. This commenter's main criticism was that DOE did not conduct a sensitivity analysis using a range of plausible fuel and vehicle cost assumptions. This commenter performed a sensitivity analysis of DOE's "gaseous fuel vehicle dominant scenario" by analyzing additional cases that used increased fuel and vehicle cost assumptions. This analysis utilized EIA fuel cost data for some of these cases. Based on the sensitivity analysis, this commenter argued that the net present value of the overall costs of the proposed rule is likely to exceed \$100 million annually, for a few years, using moderate price assumptions. Thus, the commenter concluded that DOE is required to perform a full-scale economic impact analysis under Executive Order 12866.

DOE found this comment to be generally helpful for evaluating the costs of the proposed rule, although it disagrees that compliance with the rule will impose costs on States and fuel providers that exceed \$100 million annually. First, the comment that the rule requires a full assessment of costs and benefits was based on calculations of cost using undiscounted values. Applying a discount rate is a standard aspect of commonly accepted cost impact analyses. Had this commenter used any reasonable discount rate, its cost analysis would have shown the costs to be less than \$100 million dollars in any one year. Second, this commenter also calculated the costs for one of the most costly

scenarios included in the DOE cost analysis, the gaseous fueled vehicle dominant scenario. This scenario assumes that natural gas vehicles will represent 75 percent of the new alternative fueled vehicles, LPG (propane) will represent 15 percent, and methanol flexible fuel vehicles will represent 10 percent of vehicles required to be acquired annually under the rule. Scenarios included in DOE's analysis that project dominant use of flexible fueled vehicles, which are believed more likely for State government fleets, result in much lower costs.

While plausible estimates of the future costs of fuel and alternative fueled vehicles may differ, the greatest uncertainty about the future costs of the rule stems from the difficulty of predicting the choices of vehicles and fuels that will be made by covered States and fuel providers. In reconsidering the cost analysis in light of the comments, DOE has conducted (and placed in the record of the rulemaking) a supplemental cost analysis that estimates the costs that would result if fleets chose to meet their requirements by acquiring vehicles that operate exclusively one fuel. Although some fleets are not expected to acquire vehicles that operate exclusively on one fuel, the analysis is useful for estimating the range of possible costs. Analyses were performed for acquisitions comprised exclusively of methanol, ethanol, natural gas or propane vehicles. The supplemental cost analysis uses EIA fuel cost estimates and current wholesale fuel prices, together with the most current information in DOE's possession on fleet size, incremental vehicle cost, vehicle turnover and

fuel consumption. In conducting the supplemental analysis, DOE did not consider the additional costs of operating alternative fueled vehicles (e.g., the time and labor required for travel to refueling sites and the extra cost of more frequent refueling). DOE acknowledges that there may be additional operational costs associated with the operation of some types of alternative fueled vehicles. However, it is not feasible, at a reasonable cost, to quantify such costs because of the uniqueness of each fleet's operational characteristics (e.g., geographic location, fuel cost, labor rate, etc.)

The results of DOE's supplemental analysis show that over the first 5 years of the program, the costs to State and fuel provider fleets together could range from a low of \$5 million per year if alcohol fueled AFVs are acquired, up to a maximum total cost of \$75 million per year if AFVs using gaseous fuels are acquired (occurring during the fifth year of the program when acquisition requirements reach their highest level). After the first five years of the program, DOE expects that economies of scale will result in steadily decreasing alternative fueled vehicle incremental costs.

## **VII. Review Under the Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, was enacted by Congress to ensure that small entities do not face significant negative economic impact as a result of Government regulations. In instances where significant impacts are possible on a substantial number of entities, agencies are required

to perform a regulatory flexibility analysis.

DOE has determined that this rule will not have a significant negative impact on a substantial number of small entities. To be covered by this rulemaking, an organization must own, operate or control at least 50 light duty motor vehicles, of which at least 20 light duty motor vehicles used primarily within a single MSA or CMSA must be capable of being centrally fueled. An organization that fits this description is usually not a small organization.

### **VIII. Review Under the Paperwork Reduction Act**

New information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501, et seq., and recordkeeping requirements are included by this rulemaking. Accordingly, this notice has been submitted to the Office of Management and Budget for review and approval of paperwork requirements. The information DOE will collect through the reporting requirements in the rule is necessary to determine whether an organization is in compliance with the regulation and whether they are eligible for the allocation of alternative fueled vehicle credits. The frequency of the information collection is annually and is due four months after the end of the compliance period (the model year). It is estimated the number of organizations submitting reports will be approximately 1000 for the years 1997 through 1999. The estimated number of organizations who will be submitting reports after that date has not been determined.

The public reporting burden is estimated to average 12 hours per response,

including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and retrieving the collection of information. The collection of information contained in this rule is considered the least burdensome for the Department of Energy functions to comply with the legal requirements and achieve program objectives.

## **IX. Review Under the National Environmental Policy Act**

This rule establishes procedures for the implementation of an Alternative Fuel Transportation Program, which are required to assist in and monitor the progress of State fleet and certain alternative fuel providers compliance activity. The rule provides for reporting procedures to demonstrate compliance with the alternative fueled vehicle acquisition mandates as specified by title V of the Energy Policy Act of 1992, and it includes procedures for interpretive rulings, exemption, appeals, and the approval process for State plans.

The rule also establishes and defines the parameters for who must comply, the parts of a vehicle inventory which are affected by the acquisition mandates, the allocation of credits for voluntary acquisitions, the investigation and enforcement in the assessment of civil penalties, and the contents of a State's light duty alternative fueled vehicle plan. Because of the foregoing non-procedural parts of the rule, the Department has prepared an Environmental Assessment (EA).

The EA assesses the environmental effects of the alternative fueled



vehicle acquisitions required by this rule and compares these effects to that of a no action alternative, whereby fleets would continue to purchase conventionally fueled vehicles. The EA finds that the alternative fueled vehicle acquisitions required by the rule would decrease State and alternative fuel provider fleet emissions of non-methane organic gases, carbon monoxide, nitrogen oxides, particulate matter and carbon dioxide for all scenarios examined. The reduction of these pollutants on a vehicle-by-vehicle comparison is sizeable. However, because the number of alternative fueled vehicles compared to the country's total population is small, the magnitude of these beneficial environmental effects are small. A less than 3% decrease in cumulative emissions from all highway vehicles in the U.S. is estimated at the end of the 25-year study period in 2020. However, the vehicles acquired due to this program and the associated emissions improvements would be concentrated in metropolitan areas.

For each of the pollutant-scenario combinations, the results show a reduction in the emission levels. When the emissions from year 2020 are compared with 1993 National Mobile Source Emissions, the reductions range from 0.001% for NO<sub>x</sub> in the Gaseous Fuel Dominant Scenario to 0.15% for CO in the Gaseous Fuel Dominant with EVs Scenario and the New Technology Dominant Scenario. When the emissions from the entire 25-year study period are compared with 1993 National Mobile Source Emissions, the reductions range from 0.02% for NO<sub>x</sub> in the Gaseous Fuel Dominant Scenario to 2.53% for CO in the Gaseous Fuel Dominant with EVs Scenario.

Based on the analysis in the Environmental Assessment, the Department has determined that the implementation of the Alternative Transportation Program does not constitute a major Federal action significantly affecting the quality of the human environment, within the meaning of the NEPA. Therefore, the preparation of an Environmental Impact Statement is not required and the Department today is publishing a Finding of No Significant Impact, elsewhere in this issue.

#### X. Impact on State Governments

Section 1(b)(9) of Executive Order 12866 ("Regulatory Planning and Review"), 58 FR 51735 (September 30, 1993) established the following principle for agencies to follow in rulemakings: "Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, agencies shall seek to harmonize Federal regulatory actions with regulated State, local and tribal

regulatory and other governmental functions." Executive Order 12875 ("Enhancing Intergovernmental Partnership"), 58 FR 58093 (October 26, 1993) provides for reduction or mitigation, to the extent allowed by law, of the burden on State, local, and tribal governments of unfunded Federal mandates not required by statute.

Title II of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of \$100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. The Department estimates that, in the aggregate, the costs to States in model year 1997 will be between \$3.3 million and \$7.4 million. The annual aggregate costs to the States should never exceed \$13 million in FY 1995 dollars. The annual aggregate costs to State, local and tribal governments and the private sector should never exceed \$100 million in FY 1995 dollars. Therefore, preparation of a formal unfunded mandate analysis is

not required. Because the rule does not contain a significant intergovernmental mandate, the procedural requirements in section 204 also do not apply to this rulemaking. However, DOE invited written comments and held three public hearings on the proposed rule. DOE received numerous comments and oral testimony from State elected officials and representatives of State executive offices and agencies with an interest in the subject of this rulemaking.

Section 507(o) of the Act explicitly prescribes the alternative fueled vehicle acquisition mandate for States which is reflected in subpart C of the regulation. Although the Act does not specifically authorize appropriation of funds to fully defray the costs of compliance, the costs and impact of the mandate are mitigated in a number of respects.

First, section 507(o) authorizes approval of acceptable alternative State plans to comply with the acquisition mandate by enlisting voluntary commitments from other fleet operators with fleets that are not subject to vehicle acquisition requirements under the Energy Policy Act of 1992. This gives States flexibility in developing a strategy for meeting the Act's vehicle acquisition percentages.

Second, section 507(i) authorizes the Department to grant exemptions from vehicle acquisition requirements for States in cases of financial hardship, in addition to exemptions when alternative fuel and alternative fueled vehicles are not available.

Third, Congress has authorized DOE to provide financial assistance to

States for alternative fuel transportation programs. Section 409 of the Act specifically authorizes DOE to provide technical and financial assistance to States for this purpose. No funds have been appropriated yet for the section 409 program. However, DOE is currently developing a program to provide funds to States, some of which could be used to offset the incremental cost of obtaining alternative fueled vehicles required by this rule.

In developing this rule, the Department consulted with a focus group of State officials from the National Association of State Energy Officials which represents energy offices in 53 States, territories and the District of Columbia. The principal concern expressed by some of these officials was the potential for conflict between the DOE program and similar programs operating under EPA or State regulations. With respect to EPA, DOE has attempted to avoid unnecessary differences between its regulations and those already promulgated by EPA.

It is important that the overlap between the regulations and the EPA regulations is limited because the DOE program would apply in MSAs and CMSAs with a 1980 Bureau of Census population of 250,000 or more, and the EPA program applies only in non-attainment areas. Of the 22 non-attainment areas identified by EPA (59 FR 50043), nine areas in California and Texas are included in applications those States have filed with EPA to opt out of the EPA Clean Fuel Fleet Program. Those applications were pending as of the date of publication of this notice. In addition, DOE has been advised that EPA expects

those areas within the Ozone Transport Commission (located in the Eastern United States) to be included in State requests to opt out of the program upon inception of the 49-State Low Emission Vehicle Program.

#### List of Subjects in 10 CFR Part 490

Appeal procedures, Energy, Energy conservation, Fuel, Gasoline, Motor vehicles, Oil imports, Petroleum, Recordkeeping and Reporting requirements, and Utilities.

Issued in Washington, D.C. on

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Brian T. Castelli

Chief-of-Staff

Energy Efficiency and Renewable Energy

**[RESERVED FOR APPENDIX A]**

For the reasons set forth in the Preamble, Title 10, Chapter II, Subchapter D, of the Code of Federal Regulations is amended by adding a new Part 490 as set forth below:

**PART 490 - ALTERNATIVE FUEL TRANSPORTATION PROGRAM**

Subpart A - General Provisions.

Sec.

§490.1 Purpose and scope.

§490.2 Definitions.

§490.3 Excluded vehicles.

§490.4 General information inquiries.

§490.5 Requests for an interpretive ruling.

§490.6 Petitions for generally applicable rulemaking.

§490.7 Relationship to other law.

Appendix A to Subpart A of Part 490 - Metropolitan Statistical

Areas/Consolidated Metropolitan Statistical Areas with 1980 Populations of  
250,000 or More

Subpart B - [Reserved]

Subpart C - Mandatory State Fleet Program.

§490.200 Purpose and scope.

§490.201 Alternative fueled vehicle acquisition mandate schedule.

§490.202 Acquisitions satisfying the mandate.



§490.203 Light Duty Alternative Fueled Vehicle plan.

§490.204 Process for granting exemptions.

§490.205 Reporting requirements.

§490.206 Violations.

Subpart D - Alternative Fuel Provider Vehicle Acquisition Mandate.

§490.300 Purpose and scope.

§490.301 Definitions.

§490.302 Vehicle acquisition mandate schedule.

§490.303 Who must comply.

§490.304 Which new light duty motor vehicles are covered.

§490.305 Acquisitions satisfying the mandate.

§490.306 Vehicle operation requirements.

§490.307 Option for electric utilities.

§490.308 Process for granting exemptions.

§490.309 Annual reporting requirements.

§490.310 Violations.

Subpart E - [Reserved]

Subpart F - Alternative Fueled Vehicle Credit Program.

§490.500 Purpose and scope.

§490.501 Applicability.

§490.502 Creditable actions.

§490.503 Credit allocation.

§490.504 Use of alternative fueled vehicle credits.

§490.505 Credit accounts.

§490.506 Alternative fueled vehicle credit transfers.

§490.507 Credit activity reporting requirements.

Subpart G - Investigations and Enforcement.

§490.600 Purpose and scope.

§490.601 Powers of the Secretary.

§490.602 Special orders.

§490.603 Prohibited acts.

§490.604 Penalties and fines.

§490.605 Statement of enforcement policy.

§490.606 Proposed assessments and orders.

§490.607 Appeals.

**Authority:** 42 U.S.C. §§ 7191, 13211, 13235, 13251, 13257, 13258, 13260-3.

## **SUBPART A - GENERAL PROVISIONS**

### **§490.1 Purpose and Scope.**

(a) The provisions of this part implement the alternative fuel transportation program under titles III, IV, V, and VI of the Energy Policy Act of 1992. (Pub. L. 102-486)

(b) The provisions of this subpart cover the definitions applicable throughout this part and procedures to obtain an interpretive ruling and to

petition for a generally applicable rule to amend this part.

## **§490.2 Definitions.**

The following definitions apply to this part --

Acquire means to take into possession or control.

Act means the Energy Policy Act of 1992 (Pub. L. 102-486) and any amendments thereof.

After-Market Converted Vehicle means an Original Equipment Manufacturer vehicle that is reconfigured by a conversion company, which is not under contract to the Original Equipment Manufacturer, to operate on an alternative fuel and whose conversion kit components are under warranty of the conversion company.

Alternative Fuel means methanol, denatured ethanol, and other alcohols; mixtures containing 85 percent or more by volume of methanol, denatured ethanol, and other alcohols with gasoline or other fuels; natural gas; liquefied petroleum gas; hydrogen; coal-derived liquid fuels; fuels (other than alcohol) derived from biological materials (including neat biodiesel); and electricity (including electricity from solar energy).

Alternative Fueled Vehicle means a dedicated vehicle or a dual fueled vehicle (including a flexible fuel vehicle as defined by this section).

Assistant Secretary means the Assistant Secretary for Energy Efficiency and Renewable Energy or any other DOE official to whom the Assistant

Secretary's duties under this part may be redelegated by the Secretary.

Automobile means a 4-wheeled vehicle propelled by conventional fuel, or by alternative fuel, manufactured primarily for use on public streets, roads, and highways (except a vehicle operated only on a rail line), and rated at

(1) Not more than 6,000 pounds gross vehicle weight; or

(2) More than 6,000, but less than 10,000 pounds gross vehicle weight, if the Secretary of Transportation has decided, by rule, that the vehicle meets the criteria in section 501(1) of the Motor Vehicle Information and Cost Savings Act, as amended, 49 U.S.C. 32901(a)(3).

Capable of Being Centrally Fueled means a vehicle can be refueled at least 75 percent of its time at the location that is owned, operated, or controlled by the fleet or covered person, or is under contract with the fleet or covered person for refueling purposes.

Centrally Fueled means that a vehicle is fueled at least 75 percent of the time at a location that is owned, operated, or controlled by the fleet or covered person, or is under contract with the fleet or covered person for refueling purposes.

Control --

(1) When it is used to determine whether one person controls another or whether two persons are under common control, means any one or a combination of the following:

(i) A third person or firm has equity ownership of 51 percent or more in

each of two firms; or

(ii) Two or more firms have common corporate officers, in whole or in substantial part, who are responsible for the day-to-day operation of the companies; or

(iii) One person or firm leases, operates, or supervises 51 percent or more of the equipment and/or facilities of another person or firm; owns 51 percent or more of the equipment and/or facilities of another person or firm; or has equity ownership of 51 percent or more of another person or firm.

(2) When it is used to refer to the management of vehicles, means a person has the authority to decide who can operate a particular vehicle, and the purposes for which the vehicle can be operated.

Covered Person means a person that owns, operates, leases, or otherwise controls -

(1) A fleet, as defined by this section, that contains at least 20 light duty motor vehicles that are centrally fueled or capable of being centrally fueled, and are used primarily within a metropolitan statistical area or a consolidated metropolitan statistical area, as established by the Bureau of the Census, with a 1980 population of 250,000 or more (as set forth in Appendix A to this subpart) or in a Federal Register notice; and

(2) at least 50 light duty motor vehicles within the United States.

Dealer Demonstration Vehicle means any vehicle that is operated by a motor vehicle dealer solely for the purpose of promoting motor vehicle sales,

either on the sales lot or through other marketing or sales promotions, or for permitting potential purchasers to drive the vehicle for pre-purchase or pre-lease evaluation.

Dedicated Vehicle means --

- (1) An automobile that operates solely on alternative fuel; or
- (2) A motor vehicle, other than an automobile, that operates solely on alternative fuel.

DOE means the Department of Energy.

Dual Fueled Vehicle means--

- (1) An automobile that meets the criteria for a dual fueled automobile as that term is defined in section 513(h)(1)(C) of the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. 32901(a)(8); or
- (2) A motor vehicle, other than an automobile, that is capable of operating on alternative fuel and on gasoline or diesel fuel; or
- (3) A flexible fuel vehicle.

Electric-hybrid Vehicle means a vehicle primarily powered by an electric motor that draws current from rechargeable storage batteries, fuel cells or other sources of electric current and also relies on a non-electric source of power.

Electric Motor Vehicle means a motor vehicle primarily powered by an electric motor that draws current from rechargeable storage batteries, fuel cells, photovoltaic arrays, or other sources of electric current and may include an electric-hybrid vehicle.

Emergency Motor Vehicle means any vehicle that is legally authorized by a government authority to exceed the speed limit to transport people and equipment to and from situations in which speed is required to save lives or property, such as a rescue vehicle, fire truck or ambulance.

Fleet means a group of 20 or more light duty motor vehicles, excluding certain categories of vehicles as provided by section 490.3, used primarily in a metropolitan statistical area or consolidated metropolitan statistical area, as established by the Bureau of the Census as of December 31, 1992, with a 1980 Census population of more than 250,000 (listed in Appendix A to this Subpart), that are centrally fueled or capable of being centrally fueled, and are owned, operated, leased, or otherwise controlled--

(1) By a person who owns, operates, leases, or otherwise controls 50 or more light duty motor vehicles within the United States and its possessions and territories;

(2) By any person who controls such person;

(3) By any person controlled by such person; and

(4) By any person under common control with such person.

Flexible Fuel Vehicle means any motor vehicle engineered and designed to be operated on any mixture of two or more different fuels.

Law Enforcement Motor Vehicle means any vehicle which is primarily operated by a civilian or military police officer or sheriff, or by personnel of the

Federal Bureau of Investigation, the Drug Enforcement Administration, or other enforcement agencies of the Federal government, or by State highway patrols, municipal law enforcement, or other similar enforcement agencies, and which is used for the purpose of law enforcement activities including, but not limited to, chase, apprehension, and surveillance of people engaged in or potentially engaged in unlawful activities.

Lease means the use and control of a motor vehicle for transportation purposes pursuant to a rental contract or similar arrangement with a term of 120 days or more.

Light Duty Motor Vehicle means a light duty truck or light duty vehicle, as such terms are defined under section 216(7) of the Clean Air Act (42 U.S.C. §7550(7)), having a gross vehicle weight rating of 8,500 pounds or less, before any after-market conversion to alternative fuel operation.

Model Year means the period from September 1 of the previous calendar year through August 31.

Motor Vehicle means a self-propelled vehicle, other than a non-road vehicle, designed for transporting persons or property on a street or highway.

Non-road Vehicle means a vehicle not licensed for on-road use, including such vehicles used principally for industrial, farming or commercial use, for rail transportation, at an airport, or for marine purposes.

Original Equipment Manufacturer means a manufacturer that provides the original design and materials for assembly and manufacture of its product.



Original Equipment Manufacturer Vehicle means a vehicle engineered, designed, produced and warranted by an Original Equipment Manufacturer.

Person means any individual, partnership, corporation, voluntary association, joint stock company, business trust, Governmental entity, or other legal entity in the United States except United States Government entities.

State means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

Used Primarily, as utilized in the definition of "fleet," means that a majority of a vehicle's total annual miles are accumulated within a covered metropolitan or consolidated metropolitan statistical area.

### **§490.3 Excluded vehicles.**

When counting light duty motor vehicles to determine under this part whether a person has a fleet or to calculate alternative fueled vehicle acquisition requirements, the following vehicles are excluded--

- (a) Motor vehicles held for lease or rental to the general public, including vehicles that are owned or controlled primarily for the purpose of short-term rental or extended-term leasing, without a driver, pursuant to a contract;
- (b) Motor vehicles held for sale by motor vehicle dealers, including demonstration motor vehicles;
- (c) Motor vehicles used for motor vehicle manufacturer product

evaluations or tests, including but not limited to, light duty motor vehicles owned or held by a university research department, independent testing laboratory, or other such evaluation facility, solely for the purpose of evaluating the performance of such vehicle for engineering, research and development or quality control reasons;

(d) Law enforcement vehicles;

(e) Emergency motor vehicles;

(f) Motor vehicles acquired and used for purposes that the Secretary of Defense has certified to DOE must be exempt for national security reasons;

(g) Nonroad vehicles; and

(h) Motor vehicles which, when not in use, are normally parked at the personal residences of the individuals that usually operate them, rather than at a central refueling, maintenance, or business location.

#### **§490.4 General information inquiries.**

DOE responses to inquiries with regard to the provisions of this part that are not filed in compliance with §§ 490.5 or 490.6 of this part constitute general information and the responses provided shall not be binding on DOE.

#### **§490.5 Requests for an interpretive ruling.**

(a) **Right to file.** Any person who is or may be subject to this part shall have the right to file a request for an interpretive ruling on a question with

regard to how the regulations apply to particular facts and circumstances.

(b) **How to file.** A request for an interpretive ruling shall be filed--

(1) With the Assistant Secretary;

(2) In an envelope labeled "Request for Interpretive Ruling under 10 CFR Part 490;" and

(3) By messenger or mail at the Office of Energy Efficiency and Renewable Energy, EE-33, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585 or at such other address as DOE may provide by notice in the **Federal Register**.

(c) **Content of request for interpretive ruling.** At a minimum, a request under this section shall--

(1) Be in writing;

(2) Be labeled "Request for Interpretive Ruling Under 10 CFR Part 490;"

(3) Identify the name, address, telephone number, and any designated representative of the person requesting the interpretive ruling;

(4) State the facts and circumstances relevant to the request;

(5) Be accompanied by copies of relevant supporting documents, if any;

(6) Specifically identify the pertinent regulations and the related question on which an interpretive ruling is sought with regard to the relevant facts and circumstances; and

(7) Contain any arguments in support of the terms of an interpretation the requester is seeking.

(d) **Public comment.** DOE may give public notice of any request for an interpretive ruling and invite public comment.

(e) **Opportunity to respond to public comment.** DOE may provide an opportunity for any person who requested an interpretive ruling to respond to public comments.

(f) **Other sources of information.** DOE may--

(1) Conduct an investigation of any statement in a request;

(2) Consider any other source of information in evaluating a request for an interpretive ruling; and

(3) Rely on previously issued interpretive rulings dealing with the same or a related issue.

(g) **Informal conference.** DOE, on its own initiative, may convene an informal conference with the person requesting an interpretive ruling.

(h) **Effect of an interpretive ruling.** The authority of an interpretive ruling shall be limited to the person requesting such ruling and shall depend on the accuracy and completeness of the facts and circumstances on which the interpretive ruling is based. An interpretive ruling by the Assistant Secretary shall be final for DOE.

(i) **Reliance on an interpretive ruling.** No person who obtains an interpretive ruling under this section shall be subject to an enforcement action for civil penalties or criminal fines for actions reasonably taken in reliance thereon, but a person may not act in reliance on an interpretive ruling that is

administratively rescinded or modified, judicially invalidated, or its prospective effect is overruled by statute or regulation.

(j) **Denials of requests for an interpretive ruling.** DOE shall deny a request for an interpretive ruling if DOE determines that--

(1) There is insufficient information upon which to base an interpretive ruling;

(2) The questions posed should be treated in a general notice of proposed rulemaking under 42 U.S.C. §7191 and 5 U.S.C. §553;

(3) There is an adequate procedure elsewhere in this part for addressing the question posed such as a petition for exemption; or

(4) For other good cause.

(k) **Public file.** DOE may file a copy of an interpretive ruling in a public file labeled "Interpretive Rulings Under 10 CFR Part 490" which shall be available during normal business hours for public inspection at the DOE Freedom of Information Reading Room at 1000 Independence Avenue, SW, Washington, DC 20585, or at such other addresses as DOE may announce in a **Federal Register** notice.

#### **§490.6 Petitions for generally applicable rulemaking.**

(a) **Right to file.** Pursuant to 42 U.S.C. § 7191 and 5 U.S.C. § 553(e), any person may file a petition for generally applicable rulemaking under titles III, IV, and V of the Act with the DOE General Counsel.

(b) **How to file.** A petition for generally applicable rulemaking under this section shall be filed by mail or messenger in an envelope addressed to the Office of General Counsel, GC-1, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585.

(c) **Content of rulemaking petitions.** A petition under this section must--

- (1) Be labeled "Petition for Rulemaking Under 10 CFR Part 490";
- (2) Describe with particularity the terms of the rule being sought;
- (3) Identify the provisions of law that direct, authorize, or affect the issuance of the rules being sought; and
- (4) Explain why DOE should not choose to make policy by precedent through interpretive rulings, petitions for exemption, or other adjudications.

(d) **Determination upon rulemaking petitions.** After considering the petition and other information deemed to be appropriate, DOE may grant the petition and issue an appropriate rulemaking notice, or deny the petition because the rule being sought--

- (1) Would be inconsistent with statutory law;
- (2) Would establish a generally applicable policy in an area that should be left to case-by-case determinations;
- (3) Would establish a policy inconsistent with the underlying statutory purposes; or
- (4) For other good cause.

**§490.7 Relationship to other law.**

(a) Nothing in this part shall be construed to require or authorize sale of, or conversion to, light duty alternative fueled motor vehicles in violation of applicable regulations of any Federal, State or local government agency.

(b) Nothing in this part shall be construed to require or authorize the use of a motor fuel in violation of applicable regulations of any Federal, State, or local government agency.

**APPENDIX A To Subpart A of Part 490**

Metropolitan Statistical Areas/Consolidated Metropolitan Statistical Areas With  
1980 Populations of 250,000 or more

Albany-Schenectady-Troy MSA NY

Albuquerque MSA NM

Allentown-Bethlehem-Easton MSA PA

Appleton-Oshkosh-Neenah MSA WI

Atlanta MSA GA

Augusta-Aiken MSA GA-SC

Austin-San Marcos MSA TX

Bakersfield MSA CA

Baton Rouge MSA LA

Beaumont-Port Arthur MSA TX

Binghamton MSA NY  
Birmingham MSA AL  
Boise City MSA ID  
Boston-Worcester-Lawrence CMSA MA-NH-ME-CT  
Buffalo-Niagara Falls MSA NY  
Canton-Massillon MSA OH  
Charleston MSA SC  
Charleston MSA WV  
Charlotte-Gastonia-Rock Hill MSA NC-SC  
Chattanooga MSA TN-GA  
Chicago-Gary-Kenosha CMSA IL-IN-WI  
Cincinnati-Hamilton CMSA OH-KY-IN  
Cleveland-Akron CMSA OH  
Colorado Springs MSA CO  
Columbia MSA SC  
Columbus MSA OH  
Columbus MSA GA-AL  
Corpus Christi MSA TX  
Dallas-Fort Worth CMSA TX  
Davenport-Moline-Rock Island MSA IA-IL  
Dayton-Springfield MSA OH  
Daytona Beach MSA FL



Denver-Boulder-Greeley CMSA CO  
Des Moines MSA IA  
Detroit-Ann Arbor-Flint CMSA MI  
Duluth MSA MN-WI  
El Paso MSA TX  
Erie MSA PA  
Eugene-Springfield MSA OR  
Evansville-Henderson MSA IN-KY  
Fort Wayne MSA IN  
Fresno MSA CA  
Grand Rapids-Muskegon-Holland MSA MI  
Greensboro-Winston Salem-High Point MSA NC  
Greenville-Spartanburg-Anderson MSA SC  
Harrisburg-Lebanon-Carlisle MSA PA  
Hartford MSA CT  
Hickory-Morganton MSA NC  
Honolulu MSA HI  
Houston-Galveston-Brazoria CMSA TX  
Huntington-Ashland MSA WV-KY-OH  
Indianapolis MSA IN  
Jackson MSA MS  
Jacksonville MSA FL

Johnson City-Kingsport-Bristol MSA TN-VA  
Johnstown MSA PA  
Kalamazoo-Battle Creek MSA MI  
Kansas City MSA MO-KS  
Knoxville MSA TN  
Lakeland-Winter Haven MSA FL  
Lancaster MSA PA  
Lansing-East Lansing MSA MI  
Las Vegas MSA NV-AZ  
Lexington MSA KY  
Little Rock-N. Little Rock MSA AR  
Los Angeles-Riverside-Orange County CMSA CA  
Louisville MSA KY-IN  
Macon MSA GA  
Madison MSA WI  
McAllen-Edinburg-Mission MSA TX  
Melbourne-Titusville-Palm Bay MSA FL  
Memphis MSA TN-AR-MS  
Miami-Fort Lauderdale CMSA FL  
Milwaukee-Racine CMSA WI  
Minneapolis-St. Paul MSA MN-WI  
Mobile MSA AL

Modesto MSA CA

Montgomery MSA AL

Nashville MSA TN

New London-Norwich MSA CT-RI

New Orleans MSA LA

New York-N. New Jersey-Long Island CMSA NY-NJ-CT-PA

Norfolk-Virginia Beach-Newport News MSA VA-NC

Oklahoma City MSA OK

Omaha MSA NE-IA

Orlando MSA FL

Pensacola MSA FL

Peoria-Pekin MSA IL

Philadelphia-Wilmington-Atlantic City CMSA PA-NJ DE-MD

Phoenix-Mesa MSA AZ

Pittsburgh MSA PA

Portland-Salem CMSA OR-WA

Providence-Fall River-Warwick MSA RI-MA

Raleigh-Durham-Chapel Hill MSA NC

Reading MSA PA

Richmond-Petersburg MSA VA

Rochester MSA NY

Rockford MSA IL

Sacramento-Yolo CMSA CA  
Saginaw-Bay City-Midland MSA MI  
St. Louis MSA MO-IL  
Salinas MSA CA  
Salt Lake City-Ogden MSA UT  
San Antonio MSA TX  
San Diego MSA CA  
San Francisco-Oakland-San Jose CMSA CA  
San Juan MSA PR  
Santa Barbara-Santa Maria-Lompoc MSA CA  
Scranton-Wilkes Barre-Hazleton MSA PA  
Seattle-Tacoma-Bremerton CMSA WA  
Shreveport-Bossier City MSA LA  
Spokane MSA WA  
Springfield MSA MA  
Stockton-Lodi MSA CA  
Syracuse MSA NY  
Tampa-St. Petersburg-Clearwater MSA FL  
Toledo MSA OH  
Tucson MSA AZ  
Tulsa MSA OK  
Utica-Rome MSA NY

Washington-Baltimore CMSA DC-MD-VA-WV

West Palm Beach-Boca Raton MSA FL

Wichita MSA KS

York MSA PA

Youngstown-Warren MSA OH

**Subpart B -- [RESERVED]**

**Subpart C -- MANDATORY STATE FLEET PROGRAM**

**§490.200 Purpose and scope.**

This subpart sets forth rules implementing the provisions of Section 507(o) of the Act which requires, subject to some exemptions, that certain percentages of new light duty motor vehicles acquired for State fleets be alternative fueled vehicles.

**§490.201 Alternative fueled vehicle acquisition mandate schedule.**

(a) Except as otherwise provided in this part, of the new light duty motor vehicles acquired annually for State government fleets, including agencies thereof but excluding municipal fleets, the following percentages shall be alternative fueled vehicles for the following model years;

- (1) 10 percent for model year 1997;
- (2) 15 percent for model year 1998;

- (3) 25 percent for model year 1999;
- (4) 50 percent for model year 2000; and
- (5) 75 percent for model year 2001 and thereafter.

(b) Each State shall calculate its alternative fueled vehicle acquisition requirements for the State government fleets, including agencies thereof, by applying the alternative fueled vehicle acquisition percentages for each model year to the total number of new light duty motor vehicles to be acquired during that model year for those fleets.

(c) If the calculation performed under paragraph (b) of this section produces a number that requires the acquisition of a partial vehicle, an adjustment to the acquisition number will be made by rounding the number of vehicles down the next whole number if the fraction is less than one half and by rounding the number of vehicles up to the next whole number if the fraction is equal to or greater than one half.

(d) A State fleet that first becomes subject to this part after model year 1997 shall acquire alternative fueled vehicles in the next model year at the percentage applicable to that model year according to the schedule in paragraph (a) of this section, unless the State is granted an exemption or reduction of the acquisition percentage pursuant to the procedures and criteria in section 490.204.

#### **§490.202 Acquisitions satisfying the mandate.**

The following actions within a model year qualify as acquisitions for the

purpose of compliance with the requirements of section 490.201 of this part:

(1) The purchase or lease of an Original Equipment Manufacturer light duty vehicle (regardless of the model year of manufacture), capable of operating on alternative fuels that was not previously under control of the State or State agency;

(2) The purchase or lease of an after-market converted light duty vehicle (regardless of model year of manufacture), that was not previously under control of the State or State agency;

(3) The conversion of a newly purchased or leased light duty vehicle to operate on alternative fuels within four months after the vehicle is acquired for a State fleet; and

(4) The application of alternative fueled vehicle credits allocated under subpart F of this part.

### **§490.203 Light Duty Alternative Fueled Vehicle Plan.**

#### **(a) General Provisions.**

(1) In lieu of meeting its requirements under section 490.201 exclusively with acquisitions for State fleets, a State may follow a Light Duty Alternative Fueled Vehicle Plan that has been approved by DOE under this section.

(2) Any Light Duty Alternative Fueled Vehicle Plan must provide for voluntary acquisitions or conversions, or combinations thereof, by State, local, and private fleets that equal or exceed the State's alternative fuel vehicle

acquisition requirement under section 490.201.

(3) Any acquisitions of light duty alternative fueled vehicles by participants in the State plan may be included for purposes of compliance, irrespective of whether the vehicles are in excluded categories set forth in section 490.3 of this part.

(4) Except as provided in paragraph (h) of this section or except for a fleet exempt under section 490.204, a State that does not have an approved plan in effect under this section is subject to the State fleet acquisition percentage requirements of section 490.201.

(5) If a significant commitment under an approved plan is not met by a participant of a plan, the State shall meet its percentage requirements under section 490.201 or submit to DOE an amendment to the plan for DOE approval.

**(b) Required elements of a plan.** Each plan must include the following elements:

(1) Certification by the Governor, or the Governor's designee, that the plan meets the requirements of this subpart;

(2) Identification of State, local and private fleets that will participate in the plan;

(3) Number of new alternative fueled vehicles to be acquired by each plan participant;

(4) A written statement from each plan participant to assure commitment;



(5) A statement of contingency measures by the State to offset any failure to fulfill significant commitments by plan participants, in order to meet the requirements of section 490.201;

(6) A provision by the State to monitor and verify implementation of the plan;

(7) A provision certifying that all acquisitions and conversions under the plan are voluntary and will meet the requirements of §247 of the Clean Air Act, as amended (42 U.S.C. §7587) and all applicable safety requirements.

**(c) When to submit plan.**

(1) For model year 1997, a State shall submit its plan on or before **[12 months after the date of publication of this rule]**.

(2) Beginning with model year 1998, a State shall submit its plan to DOE no later than June 1 prior to the first model year covered by such plan.

**(d) Review and approval.** DOE shall review and approve a plan which meets the requirements of this subpart within 60 days of the date of receipt of the plan by DOE at the address in paragraph (g)(1) of this section.

**(e) Disapproval of plans.** If DOE disapproves or requests a State to submit additional information, the State may revise and resubmit the plan to DOE within a reasonable time.

**(f) How a State may modify an approved plan.** If a State determines that it cannot successfully implement its plan, it may submit to DOE for approval, at any time, the proposed modifications with adequate

justifications.

**(g) Where to submit plans.**

(1) A State shall submit to DOE an original and two copies of the plan and shall be addressed to the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE-33, 1000 Independence Ave., SW, Washington, DC 20585, or to such other address as DOE may announce in a Federal Register notice.

(2) Any requests for modifications shall also be sent to the address in paragraph (g)(1) of this section.

**(h) MY 1997 Exemption**

(1) On or after September 1, 1996, a State shall be deemed automatically exempt from section 490.201 (a)(1) until DOE makes a final determination on a timely application to approve a plan for model year 1997 under this section if the State:

(i) Has submitted the application; or

(ii) Has sent a written notice to the Assistant Secretary, at the address under paragraph (g)(1) of this section, that it will file such an application on or before **[insert 12 months from date of publication]**.

(2) During the period of an automatic exemption under this paragraph, a State may procure light duty motor vehicles in accordance with its normal procurement policies.

**§490.204 Process for granting exemptions.**

(a) To obtain an exemption, in whole or in part, from the vehicle acquisition mandate in section 490.201 of this part, a State shall submit to DOE a written request for exemption, along with supporting documentation which must demonstrate that--

(1) Alternative fuels that meet the normal requirements and practices of the principal business of the State fleet are not available from fueling sites that would permit central fueling of fleet vehicles in the area in which the vehicles are to be operated; or

(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the State fleet are not available for purchase or lease commercially on reasonable terms and conditions in the State; or

(3) The application of such requirements would pose an unreasonable financial hardship.

(b) Requests for exemption may be submitted at any time and must be accompanied with supporting documentation.

(c) Exemptions are granted for one model year only, and they may be renewed annually, if supporting documentation is provided.

(d) Exemptions may be granted in whole or in part. When granting an exemption in part, DOE may, depending upon the circumstances, completely relieve a State from complying with a portion of the vehicle acquisition

requirements for a model year, or it may require a State to acquire all or some of the exempted vehicles in future model years.

(e) If a State is seeking an exemption under--

(1) Paragraph (a)(1) of this section, the types of documentation that are to accompany the request must include, but are not limited to, maps of vehicle operation zones and maps of locations providing alternative fuel; or

(2) Paragraph (a)(2) of this section, the types of documentation that are to accompany the request must include, but are not limited to, alternative fueled vehicle purchase or lease requests, a listing of vehicles that meet the normal practices and requirements of the State fleet, and any other documentation that exhibits good faith efforts to acquire alternative fueled vehicles; or

(3) Paragraph (a)(3) of this section, it must submit a statement identifying what portion of the alternative fueled vehicle acquisition requirement should be subject to the exemption and describing the specific nature of the financial hardship that precludes compliance.

(f) Requests for exemption shall be addressed to the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, EE-33, 1000 Independence Ave., SW, Washington, DC 20585, or to such other address as DOE may announce in a **Federal Register** notice.

(g) The Assistant Secretary shall provide to the State, within 45 days of receipt of a request that complies with this section, a written determination as to whether the State's request has been granted or denied.

(h) If the Assistant Secretary denies an exemption, in whole or in part, and the State wishes to exhaust administrative remedies, the State must appeal within 30 days of the date of the determination, pursuant to 10 CFR part 1003, subpart C, to the Office of Hearings and Appeals, U. S. Department of Energy, 1000 Independence Ave., SW, Washington, DC 20585. The Assistant Secretary's determination shall be stayed during the pendency of an appeal under this paragraph.

#### **§490.205 Reporting requirements.**

(a) Any State subject to the requirements of this subpart must file an annual report for each State fleet on or before the December 31 after the close of the model year, beginning with model year 1997. The State annual report may consist of a single State report or separately prepared State agency reports.

(b) The report shall include the following information:

(1) Number of new light duty motor vehicles acquired for the fleet by a State during the model year;

(2) Number of new light duty alternative fueled vehicles that are required to be acquired during the model year;

(3) Number of new light duty alternative fueled vehicle acquisitions by the State during the model year;

(4) Number of alternative fueled vehicle credits applied against

acquisition requirements;

(5) For each new light duty alternative fueled vehicle acquisition --

(i) Vehicle make and model;

(ii) Model year;

(iii) Vehicle identification number;

(iv) Dedicated or dual-fueled (including flexible fuel); and

(v) Type of alternative fuel the vehicle is capable of operating on; and

(6) Number of light duty alternative fueled vehicles acquired by municipal and private fleets during the model year under an approved Light Duty Alternative Fueled Vehicle Plan (if applicable).

(c) If credits are applied against vehicle acquisition requirements, then a credit activity report, as described in subpart F of this part, must be submitted with the report under this section to DOE.

(d) Records shall be maintained and retained for a period of three years.

(e) All reports, marked "Annual Report," shall be sent to the Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, EE-33, 1000 Independence Ave., SW, Washington, DC, 20585, or such other address as DOE may provide by notice in the Federal Register.

#### **§490.206 Violations.**

Violations of this subpart are subject to investigation and enforcement under subpart G of this part.

## **SUBPART D - ALTERNATIVE FUEL PROVIDER VEHICLE ACQUISITION MANDATE**

### **§490.300 Purpose and Scope.**

This subpart implements section 501 of the Act, which requires, subject to some exemptions, that certain annual percentages of new light duty motor vehicles acquired by alternative fuel providers must be alternative fueled vehicles.

### **§490.301 Definitions.**

In addition to the definitions found in section 490.2, the following definitions apply to this subpart --

Affiliate means a person that, directly or indirectly, controls, is controlled by, or is under common ownership or control of a person subject to vehicle acquisition requirements in this part.

Alternative Fuels Business means activities undertaken to derive revenue from --

(1) Producing, storing, refining, processing, transporting, distributing, importing, or selling at wholesale or retail any alternative fuel other than electricity; or

(2) Generating, transmitting, importing, or selling at wholesale or retail electricity.

Business Unit means a semi-autonomous major grouping of activities for administrative purposes and organizational structure within a business entity and that is controlled by or under control of a person subject to vehicle acquisition requirements in this part.

Division means a major administrative unit of an enterprise comprising at least several enterprise units or constituting a complete integrated unit for a specific purpose and that is controlled by or under control of a person subject to vehicle acquisition requirements in this part.

Normal Requirements and Practices means the operating business practices and required conditions under which the principal business of a person subject to vehicle acquisition requirements in this part operates.

Principal Business means the sales-related activity that produces the greatest gross revenue.

Substantial Portion means that at least 30 percent of the annual gross revenue of a covered person is derived from the sale of alternative fuels.

Substantially Engaged means that a covered person, or affiliate, division, or other business unit thereof, regularly derives more than a negligible amount of sales-related gross revenue from an alternative fuels business.

#### **§490.302 Vehicle acquisition mandate schedule.**

(a) Except as provided in section 490.304 of this part, of the light duty motor vehicles newly acquired by a covered person described in section



490.303 of this part, the following percentages shall be alternative fueled vehicles for the following model years:

- (1) 30 percent for model year 1997.
- (2) 50 percent for model year 1998.
- (3) 70 percent for model year 1999.
- (4) 90 percent for model year 2000 and thereafter.

(b) Except as provided in section 490.304 of this part, this acquisition schedule applies to all light duty motor vehicles that a covered person newly acquires for use within the United States.

(c) If, when the mandated acquisition percentage of alternative fuel vehicles is applied to the number of new light duty motor vehicles to be acquired by a covered person subject to this subpart, a number results that requires the acquisition of a partial vehicle, an adjustment will be made to the required acquisition number by rounding down to the next whole number if the fraction is less than one half and by rounding up the number of vehicles to the next whole number if the fraction is equal to or greater than one half.

(d) Only acquisitions satisfying the mandate, as defined by section 490.305, count toward compliance with the acquisition schedule in paragraph (a) of this section.

(e) A covered person that is first subject to the acquisition requirements of this part after model year 1997 shall acquire alternative fueled vehicles in the next model year at the percentage applicable to that model year, according to

the schedule in paragraph (a) of this section, unless the covered person is granted an exemption or reduction of the acquisition percentage pursuant to the procedures and criteria in section 490.308.

**§490.303 Who must comply.**

(a) Except as provided by paragraph (b) of this section, a covered person must comply with the requirements of this subpart if that person is --

(1) A covered person whose principal business is producing, storing, refining, processing, transporting, distributing, importing or selling at wholesale or retail any alternative fuel other than electricity; or

(2) A covered person whose principal business is generating, transmitting, importing, or selling, at wholesale or retail, electricity; or

(3) A covered person --

(i) Who produces, imports, or produces and imports in combination, an average of 50,000 barrels per day or more of petroleum; and

(ii) A substantial portion of whose business is producing alternative fuels.

(b) This subpart does not apply to a covered person or affiliate, division, or other business unit of such person whose principal business is -

(1) transforming alternative fuels into a product that is not an alternative fuel; or

(2) consuming alternative fuels as a feedstock or fuel in the manufacture of a product that is not an alternative fuel.

#### **§490.304 Which new light duty motor vehicles are covered.**

(a) **General rule.** Except as provided in paragraph (b) of this section, the vehicle acquisition mandate schedule in section 490.302 of this part applies to all light duty motor vehicles newly acquired for use within the United States by a covered person described in section 490.303 of this part.

(b) **Exception.** If a covered person has more than one affiliate, division, or other business unit, then section 490.302 of this part only applies to light duty motor vehicles newly acquired by an affiliate, division, or other such business unit which is substantially engaged in the alternative fuels business.

#### **§490.305 Acquisitions satisfying the mandate.**

The following actions within the model year qualify as acquisitions for the purpose of compliance with the requirements of section 490.302 of this part --

(1) The purchase or lease of an Original Equipment Manufacturer light duty vehicle (regardless of the model year of manufacture), capable of operating on alternative fuels that was not previously under the control of the covered person;

(2) The purchase or lease of an after-market converted light duty vehicle (regardless of the model year of manufacture), that was not previously under the control of the covered person; and

(3) The conversion of a newly purchased or leased light duty vehicle to operate on alternative fuels within four months after the vehicle is acquired by a

covered person; and

(4) The application of alternative fueled vehicle credits allocated under subpart F of this part.

#### **§490.306 Vehicle operation requirements.**

The alternative fueled vehicles acquired pursuant to section 490.302 of this part shall be operated solely on alternative fuels, except when these vehicles are operating in an area where the appropriate alternative fuel is unavailable.

#### **§490.307 Option for Electric Utilities.**

(a) A covered person or its affiliate, division, or business unit, whose principal business is generating, transmitting, importing, or selling, at wholesale or retail, electricity has the option of delaying the vehicle acquisition mandate schedule in section 490.302 until January 1, 1998, if the covered person intends to comply with this regulation by acquiring electric motor vehicles.

(b) If a covered person or its affiliate, division, or business unit, whose principal business is generating, transmitting, importing, or selling at wholesale or retail electricity has notified the Department as required by the Act, of its intent to acquire electric motor vehicles, the following percentages of new light duty motor vehicles acquired shall be alternative fueled vehicles for the following time periods:

(1) 30 percent from January 1, 1998 to August 31, 1998.

(2) 50 percent for model year 1999.

(3) 70 percent for model year 2000.

(4) 90 percent for model year 2001 and thereafter.

(c) Any covered person or its affiliate, division, or business unit, that chooses the option provided by this section may apply for an exemption from the vehicle acquisition mandate in accordance with section 490.308 of this regulation.

(d) Any covered person or its affiliate, division, or business unit, that chooses to rescind its election of the option provided in this section shall be required, unless otherwise exempt, to acquire alternative fueled vehicles in accordance with the vehicle acquisition schedule in section 490.302.

#### **§490.308 Process for granting exemptions.**

(a) To obtain an exemption from the vehicle acquisition mandate in this subpart, a covered person, or its affiliate, division, or business unit which is subject to section 490.302 of this part, shall submit a written request for exemption to the Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, EE-33, 1000 Independence Ave., SW, Washington, DC 20585, or such other address as DOE may publish in the **Federal Register**, along with the supporting documentation required by this section.

(b) A covered person requesting an exemption must demonstrate that--

(1) Alternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available from fueling sites that would permit central fueling of that person's vehicles in the area in which the vehicles are to be operated; or

(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the covered person are not available for purchase or lease commercially on reasonable terms and conditions in any State included in a MSA/CMSA that the vehicles are operated in.

(c) **Documentation**

(1) Except as provided in subparagraph (c)(2) of this section, if a covered person is seeking an exemption under paragraph (b)(1) of this section, the types of documentation that are to accompany the request include, but are not limited to, maps of vehicle operation zones and maps of locations providing alternative fuel.

(2) If a covered person seeking an exemption under paragraph (b)(1) of this section operates light duty vehicles outside of the areas listed in Appendix A of subpart A, and central fueling of those vehicles does not meet the normal requirements and practices of that person's business, then that covered person shall only be required to justify in a written request why central fueling is incompatible with its business. (3) If a covered person is seeking an exemption under paragraph (b)(2) of this section, the types of documentation that are to accompany the request include, but are not limited to, alternative fueled vehicle

purchase or lease requests, a listing of vehicles that meet the normal practices and requirements of the covered person and any other documentation that exhibits good faith efforts to acquire alternative fueled vehicles.

(d) Exemptions are granted for one model year only and may be renewed annually, if supporting documentation is provided.

(e) Exemptions may be granted in whole or in part. When granting an exemption in part, DOE may, depending upon the circumstances, completely relieve a covered person from complying with a portion of the vehicle acquisition requirements for a model year, or it may require a covered person to acquire all or some of the exempted vehicles in future model years.

(f) The Assistant Secretary shall provide to the covered person within 45 days after receipt of a request that complies with this section, a written determination as to whether the State's request has been granted or denied.

(g) If a covered person is denied an exemption, that covered person may file an appeal within 30 days of the date of determination, pursuant to 10 CFR part 1003, subpart C, with the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Ave, SW, Washington, DC 20585. The Assistant Secretary's determination shall be stayed during the pendency of an appeal under this paragraph.

#### **§490.309 Annual reporting requirements.**

(a) If a person is required to comply with the vehicle acquisition

schedule in section 490.302 or section 490.307, that person shall file an annual report under this section, on a form obtainable from DOE, with the Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, EE-33, 1000 Independence Ave., SW, Washington, DC 20585, or such other address as DOE may publish in the **Federal Register**, on or before the December 31 after the close of the applicable model year.

(b) This report shall include the following information -

(1) Number of new light duty motor vehicles acquired by the covered person in the United States during the model year;

(2) Number of new light duty alternative fueled vehicles that are required to be acquired during the model year;

(3) Number of new light duty alternative fueled vehicle acquisitions in the United States during the model year;

(4) Number of alternative fueled vehicle credits applied against acquisition requirements;

(5) For each new light duty alternative fueled vehicle acquisition -

(i) Vehicle make and model;

(ii) Model year;

(iii) Vehicle Identification Number;

(iv) Dedicated or dual-fueled (including flexible fuel); and

(v) Type of alternative fuel the vehicle is capable of operating on.

(c) If credits are applied against alternative fueled vehicle acquisition



requirements, then a credit activity report, as described in subpart F, must be submitted with the report under this section to DOE.

(d) Records shall be maintained and retained for a period of three years.

#### **§490.310 Violations.**

Violations of this subpart are subject to investigation and enforcement under subpart G of this part.

### **SUBPART E [RESERVED]**

### **SUBPART F - Alternative Fueled Vehicle Credit Program**

#### **§490.500 Purpose and Scope.**

This subpart implements the statutory requirements of section 508 of the Act, which provides for the allocation of credits to fleets or covered persons who acquire alternative fueled vehicles in excess of the number they are required or obtain alternative fueled vehicles before the model year when they are first required to do so under this part.

#### **§490.501 Applicability.**

This subpart applies to all fleets and covered persons who are required to acquire alternative fueled vehicles by this part.

#### **§490.502 Creditable actions.**

A fleet or covered person becomes entitled to alternative fueled vehicle credits by --

(a) Acquiring alternative fueled vehicles, including those in excluded categories under section 490.3 of this part and those exceeding 8,500 gross vehicle weight rating, in excess of the number of alternative fueled vehicles that fleet or covered person is required to acquire in a model year when acquisition requirements apply; or

(b) Acquiring alternative fueled vehicles, including those in excluded categories under section 490.3 of this part and those exceeding 8,500 gross vehicle weight rating, in model years before the model year when that fleet or covered person is first required to acquire alternative fueled vehicles.

(c) For purposes of this subpart, a fleet or covered person that acquired a motor vehicle on or after October 24, 1992, and converted it to an alternative fueled vehicle before **[30 days after publication of this rule]**, shall be entitled to a credit for that vehicle notwithstanding the time limit on conversions established by sections 490.202(a)(3) and 490.305(a)(3) of this part.

#### **§490.503 Credit allocation.**

(a) Based on annual credit activity report information, as described in section 490.507 of this part, DOE shall allocate one credit for each alternative fueled vehicle a fleet or covered person acquires that exceeds the number of

alternative fueled vehicles that fleet or person is required to acquire in a model year when acquisition requirements apply.

(b) If an alternative fueled vehicle is acquired by a fleet or covered person in a model year before the first model year that fleet or person is required to acquire alternative fueled vehicles by this part, as reported in the annual credit activity report, DOE shall allocate one credit per alternative fueled vehicle for each year the alternative fueled vehicle is acquired before the model year when acquisition requirements apply.

(c) DOE shall allocate credits to fleets and covered persons under paragraph (b) of this section only for alternative fueled vehicles acquired on or after October 24, 1992.

#### **§490.504 Use of alternative fueled vehicle credits.**

At the request of a fleet or covered person in an annual report under this part, DOE shall treat each credit as the acquisition of an alternative fueled vehicle that the fleet or covered person is required to acquire under this part. Each credit shall count as the acquisition of one alternative fueled vehicle in the model year for which the fleet or covered person requests the credit to be applied.

#### **§490.505 Credit accounts.**

(a) DOE shall establish a credit account for each fleet or covered person

who obtains an alternative fueled vehicle credit.

(b) DOE shall send to each fleet and covered person an annual credit account balance statement after the receipt of its credit activity report under section 490.507.

**§490.506 Alternative fueled vehicle credit transfers.**

(a) Any fleet or covered person that is required to acquire alternative fueled vehicles may transfer an alternative fueled vehicle credit to --

(1) A fleet that is required to acquire alternative fueled vehicles; or

(2) A covered person subject to the requirements of this part, if the transferor provides certification to the covered person that the credit represents a vehicle that operates solely on alternative fuel.

(b) Proof of credit transfer may be on a form provided by DOE, or otherwise in writing, and must include dated signatures of the transferor and transferee. The proof should be received by DOE within 30 days of the transfer date to the Office of Energy Efficiency and Renewable Energy, U.S.

Department of Energy, EE-33, 1000 Independence Ave, SW, Washington, DC 20585 or such other address as DOE publishes in the Federal Register.

**§490.507 Credit activity reporting requirements.**

(a) A covered person or fleet applying for allocation of alternative fueled vehicle credits must submit a credit activity report by the December 31 after the

close of a model year to the Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, EE-33, 1000 Independence Ave, SW, Washington, DC 20585 or other such address as DOE may publish in the **Federal**

**Register.**

(b) This report must include the following information:

(1) Number of alternative fueled vehicle credits requested for:

(i) alternative fueled vehicles acquired in excess of required acquisition number; and

(ii) alternative fueled vehicles acquired in model years before the first model year the fleet or covered person is required to acquire vehicles by this part.

(2) Purchase of alternative fueled vehicle credits:

(i) Credit source; and

(ii) Date of purchase;

(3) Sale of alternative fueled vehicle credits:

(i) Credit purchaser; and

(ii) Date of sale.

**SUBPART G -- Investigations and Enforcement**

**§490.600 Purpose and scope.**

This subpart sets forth the rules applicable to investigations under titles

III, IV, V, and VI of the Act and to enforcement of section 501, 503(b), 507 or 508 of the Act, or any regulation issued under such sections.

**§490.601 Powers of the Secretary.**

For the purpose of carrying out titles III, IV, V, and VI of the Act, DOE may hold such hearings, take such testimony, sit and act at such times and places, administer such oaths, and require by subpoena the attendance and testimony of such witnesses and the production of such books, papers, correspondence, memoranda, contracts, agreements, or other records as the Secretary of Transportation is authorized to do under section 505(b)(1) of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. §2005(b)(1)).

**§490.602 Special orders.**

(a) DOE may require by general or special orders that any person--

(1) File, in such form as DOE may prescribe, reports or answers in writing to specific questions relating to any function of DOE under this part; and

(2) Provide DOE access to (and for the purpose of examination, the right to copy) any documentary evidence of such person which is relevant to any function of DOE under this part.

(b) File under oath any reports and answers provided under this section or as otherwise prescribed by DOE, and file such reports and answers with DOE within such reasonable time and at such place as DOE may prescribe.

#### **§490.603 Prohibited acts.**

It is unlawful for any person to violate any provision of section 501, 503(b), or 507 of the Act, or any regulations issued under such sections.

#### **§490.604 Penalties and Fines.**

(a) **Civil penalties.** Whoever violates section 490.603 of this part shall be subject to a civil penalty of not more than \$5,000 for each violation.

(b) **Willful violations.** Whoever willfully violates section 490.603 of this part shall pay a criminal fine of not more than \$10,000 for each violation.

(c) **Repeated violations.** Any person who knowingly and willfully violates section 490.603 of this part, after having been subjected to a civil penalty for a prior violation of section 490.603 shall pay a criminal fine of not more than \$50,000 for each violation.

#### **§490.605 Statement of enforcement policy.**

DOE may agree not to commence an enforcement proceeding, or may agree to settle an enforcement proceeding, if the person agrees to come into compliance in a manner satisfactory to DOE. DOE normally will not commence an enforcement action against a person subject to the acquisition requirements of this part without giving that person notice of its intent to enforce 90 days before the beginning of an enforcement proceeding.

**§490.606 Proposed assessments and orders.**

DOE may issue a proposed assessment of, and order to pay, a civil penalty in a written statement setting forth supporting findings of violation of the Act or a relevant regulation of this part. The proposed assessment and order shall be served on the person named therein by certified mail, return-receipt requested, and shall become final for DOE if not timely appealed pursuant to section 490.607 of this part.

**§490.607 Appeals.**

(a) In order to exhaust administrative remedies, on or before 30 days from the date of issuance of a proposed assessment and order to pay, a person must appeal a proposed assessment and order to the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585.

(b) Proceedings in the Office of Hearings and Appeals shall be subject to subpart F of 10 CFR part 1003 except that--

(1) Appellant shall have the ultimate burden of persuasion;

(2) Appellant shall have right to a trial-type hearing on contested issues of fact only if the hearing officer concludes that cross examination will materially assist in determining facts in addition to evidence available in documentary form; and

(3) The Office of Hearings and Appeals may issue such orders as it may



deem appropriate on all other procedural matters.

(c) The determination of the Office of Hearings and Appeals shall be final for DOE.